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Consumer Track

Claims Madness

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Hon. Anita L. Shodeen
U.S. Bankruptcy Court (S.D. Iowa); Des Moines

CONCURRENT SESSION

2017

CLAIMS MADNESS

Discussion of various claims related topics and issues including the impact and implications of the Supreme Court's May 2017 decision in Midland Funding, LLC v. Johnson.

By

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SUPREME COURT OF THE UNITED STATES

Syllabus

MIDLAND FUNDING, LLC *v.* JOHNSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16–348. Argued January 17, 2017—Decided May 15, 2017

Petitioner Midland Funding filed a proof of claim in respondent Johnson's Chapter 13 bankruptcy case, asserting that Johnson owed Midland credit-card debt and noting that the last time any charge appeared on Johnson's account was more than 10 years ago. The relevant statute of limitations under Alabama law is six years. Johnson objected to the claim, and the Bankruptcy Court disallowed it. Johnson then sued Midland, claiming that its filing a proof of claim on an obviously time-barred debt was "false," "deceptive," "misleading," "unconscionable," and "unfair" within the meaning of the Fair Debt Collection Practices Act, 15 U. S. C. §§1692e, 1692f. The District Court held that the Act did not apply and dismissed the suit. The Eleventh Circuit reversed.

Held: The filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act. Pp. 2–10.

(a) Midland's proof of claim was not "false, deceptive, or misleading." The Bankruptcy Code defines the term "claim" as a "right to payment," 11 U. S. C. §101(5)(A), and state law usually determines whether a person has such a right, see *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 450–451. The relevant Alabama law provides that a creditor has the right to payment of a debt even after the limitations period has expired.

Johnson argues that the word "claim" means "enforceable claim." But the word "enforceable" does not appear in the Code's definition, and Johnson's interpretation is difficult to square with Congress's intent "to adopt the broadest available definition of 'claim,'" *Johnson* v. *Home State Bank*, 501 U. S. 78, 83. Other Code provisions are still

more difficult to square with Johnson's interpretation. For example, §502(b)(1) says that if a "claim" is "unenforceable" it will be disallowed, not that it is not a "claim." Other provisions make clear that the running of a limitations period constitutes an affirmative defense that a debtor is to assert after the creditor makes a "claim." §§502, 558. The law has long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative defense, and there is nothing misleading or deceptive in the filing of a proof of claim that follows the Code's similar system.

Indeed, to determine whether a statement is misleading normally "requires consideration of the legal sophistication of its audience," *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 383, n. 37, which in a Chapter 13 bankruptcy includes a trustee who is likely to understand that a proof of claim is a statement by the creditor that he or she has a right to payment that is subject to disallowance, including disallowance based on untimeliness. Pp. 2–5.

(b) Several circumstances, taken together, lead to the conclusion that Midland's proof of claim was not "unfair" or "unconscionable" within the terms of the Fair Debt Collection Practices Act.

Johnson points out that several lower courts have found or indicated that, in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be time barred is "unfair." But those courts rested their conclusions upon their concern that a consumer might unwittingly repay a time-barred debt. Such considerations have significantly diminished force in a Chapter 13 bankruptcy, where the consumer initiates the proceeding, see §§301, 303(a); where a knowledgeable trustee is available, see §1302(a); where procedural rules more directly guide the evaluation of claims, see Fed. Rule Bkrtcy. Proc. 3001(c)(3)(A); and where the claims resolution process is "generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit," *In re Gatewood*, 533 B. R. 905, 909.

Also unpersuasive is Johnson's argument that there is no legitimate reason for allowing a practice like this one that risks harm to the debtor. The bankruptcy system treats untimeliness as an affirmative defense and normally gives the trustee the burden of investigating claims to see if one is stale. And, at least on occasion, the assertion of even a stale claim can benefit the debtor.

More importantly, a change in the simple affirmative-defense approach, carving out an exception, would require defining the exception's boundaries. Does it apply only where a claim's staleness appears on the face of the proof of claim? Does it apply to other affirmative defenses or only to the running of the limitations period? Neither the Fair Debt Collection Practices Act nor the Bankruptcy

Code indicates that Congress intended an ordinary civil court applying the Act to determine answers to such bankruptcy-related questions. The Act and the Code have different purposes and structural features. The Act seeks to help consumers by preventing consumer bankruptcies in the first place, while the Code creates and maintains the "delicate balance of a debtor's protections and obligations," *Kokoszka* v. *Belford*, 417 U. S. 642, 651. Applying the Act in this context would upset that "delicate balance."

Contrary to the argument of the United States, the promulgation of Bankruptcy Rule 9011 did not resolve this issue. Pp. 5–10.

823 F. 3d 1334, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined. GORSUCH, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–348

MIDLAND FUNDING, LLC, PETITIONER *v.* ALEIDA JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 15, 2017]

JUSTICE BREYER delivered the opinion of the Court.

The Fair Debt Collection Practices Act, 91 Stat. 874, 15 U. S. C. §1692 *et seq.*, prohibits a debt collector from asserting any "false, deceptive, or misleading representation," or using any "unfair or unconscionable means" to collect, or attempt to collect, a debt, §§1692e, 1692f. In this case, a debt collector filed a written statement in a Chapter 13 bankruptcy proceeding claiming that the debtor owed the debt collector money. The statement made clear, however, that the 6-year statute of limitations governing collection of the claimed debt had long since run. The question before us is whether the debt collector's filing of that statement falls within the scope of the aforementioned provisions of the Fair Debt Collection Practices Act. We conclude that it does not.

I

In March 2014, Aleida Johnson, the respondent, filed for personal bankruptcy under Chapter 13 of the Bankruptcy Code (or Code), 11 U. S. C. §1301 *et seq*, in the Federal District Court for the Southern District of Alabama. Two months later, Midland Funding, LLC, the petitioner, filed

a "proof of claim," a written statement asserting that Johnson owed Midland a credit-card debt of $1,879.71. The statement added that the last time any charge appeared on Johnson's account was in May 2003, more than 10 years before Johnson filed for bankruptcy. The relevant statute of limitations is six years. See Ala. Code §6–2–34 (2014). Johnson, represented by counsel, objected to the claim; Midland did not respond to the objection; and the Bankruptcy Court disallowed the claim.

Subsequently, Johnson brought this lawsuit against Midland seeking actual damages, statutory damages, attorney's fees, and costs for a violation of the Fair Debt Collection Practices Act. See 15 U. S. C. §1692k. The District Court decided that the Act did not apply and therefore dismissed the action. The Court of Appeals for the Eleventh Circuit disagreed and reversed the District Court. 823 F. 3d 1334 (2016). Midland filed a petition for certiorari, noting a division of opinion among the Courts of Appeals on the question whether the conduct at issue here is "false," "deceptive," "misleading," "unconscionable," or "unfair" within the meaning of the Act. Compare *ibid.* (finding the Fair Debt Collection Practices Act applicable) with *In re Dubois*, 834 F. 3d 522 (CA4 2016) (finding the Act inapplicable); *Owens* v. *LVNV Funding, LLC*, 832 F. 3d 726 (CA7 2016) (same); and *Nelson* v. *Midland Credit Management, Inc.*, 828 F. 3d 749 (CA8 2016) (same). We granted the petition. We now reverse the Court of Appeals.

II

Like the majority of Courts of Appeals that have considered the matter, we conclude that Midland's filing of a proof of claim that on its face indicates that the limitations period has run does not fall within the scope of any of the five relevant words of the Fair Debt Collection Practices Act. We believe it reasonably clear that Midland's proof of

claim was not "false, deceptive, or misleading." Midland's proof of claim falls within the Bankruptcy Code's definition of the term "claim." A "claim" is a "right to payment." 11 U. S. C. §101(5)(A). State law usually determines whether a person has such a right. See *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 450–451 (2007). The relevant state law is the law of Alabama. And Alabama's law, like the law of many States, provides that a creditor has the right to payment of a debt even after the limitations period has expired. See *Ex parte HealthSouth Corp.*, 974 S. 2d 288, 296 (Ala. 2007) (passage of time extinguishes remedy but the right remains); see also, *e.g., Sallaz* v. *Rice*, 161 Idaho 223, ___, 384 P. 3d 987, 992–993 (2016) (similar); *Notte* v. *Merchants Mut. Ins. Co.*, 185 N. J. 490, 499–500, 888 A. 2d 464, 469 (2006) (similar); *Potterton* v. *Ryland Group, Inc.*, 289 Md. 371, 375–376, 424 A. 2d 761, 764 (1981) (similar); *Summers* v. *Connolly*, 159 Ohio St. 396, 400–402, 112 N. E. 2d 391, 394 (1953) (similar); *DeVries* v. *Secretary of State*, 329 Mich. 68, 75, 44 N. W. 2d 872, 876 (1950) (similar); *Fleming* v. *Yeazel*, 379 Ill. 343, 344–346, 40 N. E. 2d 507, 508 (1942) (similar); *Fidelity & Cas. Co. of N. Y.* v. *Lackland*, 175 Va. 178, 185–187, 8 S. E. 2d 306, 309 (1940) (similar); *Insurance Co.* v. *Dunscomb*, 108 Tenn. 724, 728–731, 69 S. W. 345, 346 (1902) (similar); but see, *e.g.,* Miss. Code Ann. §15–1–3(1) (2012) (expiration of the limitations period extinguishes the remedy and the right); Wis. Stat. §893.05 (2011–2012) (same).

Johnson argues that the Code's word "claim" means "enforceable claim." She notes that this Court once referred to a bankruptcy "claim" as "an enforceable obligation." *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 559 (1990). And, she concludes, Midland's "proof of claim" was false (or deceptive or misleading) because its "claim" was not enforceable. Brief for Respondent 22; Brief for United States as *Amicus Curiae* 18–

20 (making a similar argument).

But we do not find this argument convincing. The word "enforceable" does not appear in the Code's definition of "claim." See 11 U. S. C. §101(5). The Court in *Davenport* likely used the word "enforceable" descriptively, for that case involved an enforceable debt. 495 U. S., at 559. And it is difficult to square Johnson's interpretation with our later statement that "Congress intended . . . to adopt the broadest available definition of 'claim.'" *Johnson* v. *Home State Bank*, 501 U. S. 78, 83 (1991).

It is still more difficult to square Johnson's interpretation with other provisions of the Bankruptcy Code. Section 502(b)(1) of the Code, for example, says that, if a "claim" is "unenforceable," it will be disallowed. It does not say that an "unenforceable" claim is not a "claim." Similarly, §101(5)(A) says that a "claim" is a "right to payment," "whether or not such right is . . . fixed, *contingent*, . . . [or] *disputed*." If a contingency does not arise, or if a claimant loses a dispute, then the claim is unenforceable. Yet this section makes clear that the unenforceable claim is nonetheless a "right to payment," hence a "claim," as the Code uses those terms.

Johnson looks for support to other provisions that govern bankruptcy proceedings, including §502(a) of the Bankruptcy Code, which states that a claim will be allowed in the absence of an objection, and Rule 3001(f) of the Federal Rules of Bankruptcy Procedure, which states that a properly filed "proof of claim . . . shall constitute prima facie evidence of the validity and amount of the claim." But these provisions do not discuss the scope of the term "claim." Rather, they restate the Bankruptcy Code's system for determining whether a claim will be allowed. Other provisions make clear that the running of a limitations period constitutes an affirmative defense, a defense that the debtor is to assert after a creditor makes a "claim." §§502, 558. The law has long treated unen-

forceability of a claim (due to the expiration of the limitations period) as an affirmative defense. See, *e.g.,* Fed. Rule Civ. Proc. 8(c)(1); 13 Encyclopaedia of Pleading and Practice 200 (W. McKinney ed. 1898). And we see nothing misleading or deceptive in the filing of a proof of claim that, in effect, follows the Code's similar system.

Indeed, to determine whether a statement is misleading normally "requires consideration of the legal sophistication of its audience." *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 383, n. 37 (1977). The audience in Chapter 13 bankruptcy cases includes a trustee, 11 U. S. C. §1302(a), who must examine proofs of claim and, where appropriate, pose an objection, §§704(a)(5), 1302(b)(1) (including any timeliness objection, §§502(b)(1), 558). And that trustee is likely to understand that, as the Code says, a proof of claim is a statement by the creditor that he or she has a right to payment subject to disallowance (including disallowance based upon, and following, the trustee's objection for untimeliness). §§101(5)(A), 502(b), 704(a)(5), 1302(b)(1). (We do not address the appropriate standard in ordinary civil litigation.)

III

Whether Midland's assertion of an obviously time-barred claim is "unfair" or "unconscionable" (within the terms of the Fair Debt Collection Practices Act) presents a closer question. First, Johnson points out that several lower courts have found or indicated that, in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be time barred is "unfair." See, *e.g., Phillips* v. *Asset Acceptance, LLC*, 736 F. 3d 1076, 1079 (CA7 2013) (holding as much); *Kimber* v. *Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (MD Ala. 1987) (same); *Huertas* v. *Galaxy Asset Management*, 641 F. 3d 28, 32–33 (CA3 2011) (indicating as much); *Castro* v. *Collecto, Inc.*, 634 F. 3d 779, 783 (CA5 2011) (same); *Frey-*

ermuth v. *Credit Bureau Servs., Inc.*, 248 F. 3d 767, 771 (CA8 2001) (same).

We are not convinced, however, by this precedent. It considers a debt collector's assertion *in a civil suit* of a claim known to be stale. We assume, for argument's sake, that the precedent is correct in that context (a matter this Court itself has not decided and does not now decide). But the context of a civil suit differs significantly from the present context, that of a Chapter 13 bankruptcy proceeding. The lower courts rested their conclusions upon their concern that a consumer might unwittingly repay a time-barred debt. Thus the Seventh Circuit pointed out that "'few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts.'" *Phillips*, *supra,* at 1079 (quoting *Kimber*, *supra,* at 1487). The "'passage of time,'" the Circuit wrote, "'dulls the consumer's memory of the circumstances and validity of the debt'" and the consumer may no longer have "'personal records.'" 736 F. 3d, at 1079 (quoting *Kimber*, *supra,* at 1487). Moreover, a consumer might pay a stale debt simply to avoid the cost and embarrassment of suit. 736 F. 3d, at 1079.

These considerations have significantly diminished force in the context of a Chapter 13 bankruptcy. The consumer initiates such a proceeding, see 11 U. S. C. §§301, 303(a), and consequently the consumer is not likely to pay a stale claim just to avoid going to court. A knowledgeable trustee is available. See §1302(a). Procedural bankruptcy rules more directly guide the evaluation of claims. See Fed. Rule Bkrtcy. Proc. 3001(c)(3)(A); Advisory Committee's Notes on Rule 3001–2011 Amdt., 11 U. S. C. App., p. 678. And, as the Eighth Circuit Bankruptcy Appellate Panel put it, the claims resolution process is "generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit." *In re Gatewood*, 533 B. R. 905, 909 (2015); see also, *e.g.,* 11 U. S. C. §502 (out-

lining generally the claims resolution process). These features of a Chapter 13 bankruptcy proceeding make it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection, and disallowance.

Second, Johnson argues that the practice at least risks harm to the debtor and that there is not "a single legitimate reason" for allowing this kind of behavior. Brief for Respondent 32. Would it not be obviously "unfair," she asks, for a debt collector to adopt a practice of buying up stale claims cheaply and asserting them in bankruptcy knowing they are stale and hoping for careless trustees? The United States, supporting Johnson, adds its view that the Federal Rules of Bankruptcy Procedure make the practice open to sanction, and argues that sanctionable conduct is unfair conduct. Brief for United States as *Amicus Curiae* 20. See Fed. Rule Bkrtcy. Proc. 9011(b)(2) (sanction possible if party violates the Rule that by "presenting to the [bankruptcy] court" any "paper," a "party is certifying that to the best of" his or her "knowledge, . . . the claims . . . therein are warranted by existing law").

We are ultimately not persuaded by these arguments. The bankruptcy system, as we have already noted, treats untimeliness as an affirmative defense. The trustee normally bears the burden of investigating claims and pointing out that a claim is stale. See *supra,* at 4–5. Moreover, protections available in a Chapter 13 bankruptcy proceeding minimize the risk to the debtor. See *supra,* at 6. And, at least on occasion, the assertion of even a stale claim can benefit a debtor. Its filing and disallowance "discharge[s]" the debt. 11 U. S. C. §1328(a). And that discharge means that the debt (even if unenforceable) will not remain on a credit report potentially affecting an individual's ability to borrow money, buy a home, and perhaps secure employment. See 15 U. S. C. §1681c(a)(4) (debt may remain on a credit report for seven years); cf. Ala. Code §6–2–34 (6-

year statute of limitations); Md. Cts. & Jud. Proc. Code Ann. §5–101 (2013) (3-year statute of limitations); cf. 16 CFR pt. 600, App. §607, ¶6 (1991) (a credit report may include discharged debt only if "the debt [is reported] as having a zero balance due to reflect the fact that the consumer is no longer liable for the discharged debt"); FTC, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations 66 (2011) (similar).

More importantly, a change in the simple affirmative-defense approach, carving out an exception, itself would require defining the boundaries of the exception. Does it apply only where (as Johnson alleged in the complaint) a claim's staleness appears "on [the] face" of the proof of claim? Does it apply to other affirmative defenses or only to the running of a limitations period?

At the same time, we do not find in either the Fair Debt Collection Practices Act or the Bankruptcy Code good reason to believe that Congress intended an ordinary civil court applying the Act to determine answers to these bankruptcy-related questions. The Act and the Code have different purposes and structural features. The Act seeks to help consumers, not necessarily by closing what Johnson and the United States characterize as a loophole in the Bankruptcy Code, but by preventing consumer bankruptcies in the first place. See, *e.g.,* 15 U. S. C. §1692(a) (recognizing the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices [which] contribute to the number of personal bankruptcies"); see also §1692(b) ("Existing laws and procedures . . . are inadequate to protect consumers"); §1692(e) (statute seeks to "eliminate abusive debt collection practices"). The Bankruptcy Code, by way of contrast, creates and maintains what we have called the "delicate balance of a debtor's protections and obligations." *Kokoszka* v. *Belford*, 417 U. S. 642, 651 (1974).

To find the Fair Debt Collection Practices Act applicable here would upset that "delicate balance." From a substantive perspective it would authorize a new significant bankruptcy-related remedy in the absence of language in the Code providing for it. Administratively, it would permit postbankruptcy litigation in an ordinary civil court concerning a creditor's state of mind—a matter often hard to determine. See 15 U. S. C. §1692k(c) (safe harbor for any debt collector who "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error"). Procedurally, it would require creditors (who assert a claim) to investigate the merits of an affirmative defense (typically the debtor's job to assert and prove) lest the creditor later be found to have known the claim was untimely. The upshot could well be added complexity, changes in settlement incentives, and a shift from the debtor to the creditor the obligation to investigate the staleness of a claim.

Unlike the United States, we do not believe that the Advisory Committee on Rules of Bankruptcy Procedure settled the issue when it promulgated Bankruptcy Rule 9011. The Committee, in considering amendments to the Federal Rules of Bankruptcy Procedure in 2009, specifically rejected a proposal that would have required a creditor to certify that there is no valid statute of limitations defense. See Agenda Book for Meeting 86–87 (Mar. 26–27, 2009). It did so in part because the working group did not want to impose an affirmative obligation on a creditor to make a prefiling investigation of a potential time-bar defense. *Ibid.* In rejecting that proposal, the Committee did note that Rule 9011 imposes a general "obligation on a claimant to undertake an inquiry reasonable under the circumstances to determine . . . that a claim is warranted by existing law and that factual contentions have evidentiary

support," and to certify as much on the proof of claim. *Id.*, at 87. The Committee also acknowledged, however, that this requirement would "not addres[s] the statute of limitation issue," but would only ensure "the accuracy of the information provided." *Ibid.*

We recognize that one Bankruptcy Court has held that filing a time-barred claim without a prefiling investigation of a potential time-bar defense merits sanctions under Rule 9011. *In re Sekema*, 523 B. R. 651, 654 (Bkrtcy. Ct. ND Ind. 2015). But others have held to the contrary. See, *e.g., In re Freeman*, 540 B. R. 129, 143–144 (Bkrtcy. Ct. ED Pa. 2015); *In re Jenkins*, 538 B. R. 129, 134–136 (Bkrcty. Ct. ND Ala. 2015); *In re Keeler*, 440 B. R. 354, 366–369 (Bkrtcy. Ct. ED Pa. 2009); see also *In re Andrews*, 394 B. R. 384, 387–388 (Bkrtcy. Ct. EDNC 2008) (recognizing that "[m]any courts have . . . found that sanctions [under Rule 9011] were not warranted for filing stale claims").

These circumstances, taken together, convince us that we cannot find the practice at issue here "unfair" or "unconscionable" within the terms of the Fair Debt Collection Practices Act.

IV

For these reasons, we conclude that filing (in a Chapter 13 bankruptcy proceeding) a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act. The judgment of the Eleventh Circuit is reversed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 16–348

MIDLAND FUNDING, LLC, PETITIONER *v.* ALEIDA JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 15, 2017]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, dissenting.

The Fair Debt Collection Practices Act (FDCPA or Act) prohibits professional debt collectors from using "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt" and from "us[ing] unfair or unconscionable means to collect" a debt. 15 U. S. C. §§1692e, 1692f. The Court today wrongfully holds that a debt collector that knowingly attempts to collect a time-barred debt in bankruptcy proceedings has violated neither of these prohibitions.

Professional debt collectors have built a business out of buying stale debt, filing claims in bankruptcy proceedings to collect it, and hoping that no one notices that the debt is too old to be enforced by the courts. This practice is both "unfair" and "unconscionable." I respectfully dissent from the Court's conclusion to the contrary.[1]

I

Americans owe trillions of dollars in consumer debt to creditors—credit card companies, schools, and car dealers,

[1] Because I believe the practice at issue here is "unfair" and "unconscionable," and thus violates 15 U. S. C. §1692f, I do not address the Court's conclusion that the practice is not "false, deceptive, or misleading" in violation of §1692e.

among others. See Fed. Reserve Bank of N. Y., Quarterly Report on Household Debt and Credit 3 (2017). Most people will repay their debts, but some cannot do so. The debts they do not pay are increasingly likely to end up in the hands of professional debt collectors—companies whose business it is to collect debts that are owed to other companies. See Consumer Financial Protection Bur., Fair Debt Collection Practices Act: Annual Report 2016, p. 8 (CFPB Report). Debt collection is a lucrative and growing industry. Last year, the Nation's 6,000 debt collection agencies earned over $13 billion in revenue. *Ibid.*

Although many debt collectors are hired by creditors to work on a third-party basis, more and more collectors also operate as "debt buyers"—purchasing debts from creditors outright and attempting to collect what they can, with the profits going to their own accounts.[2] See FTC, The Structure and Practices of the Debt Buying Industry 11–12 (2013) (FTC Report); CFPB Report 10. Debt buyers now hold hundreds of billions of dollars in consumer debt; indeed, a study conducted by the Federal Trade Commission (FTC) in 2009 found that nine of the leading debt buyers had purchased over $140 billion in debt just in the previous three years. FTC Report, at i–ii, T–3 (Table 3).

Because creditors themselves have given up trying to collect the debts they sell to debt buyers, they sell those debts for pennies on the dollar. *Id.,* at 23. The older the debt, the greater the discount: While debt buyers pay close to eight cents per dollar for debts under three years old, they pay as little as two cents per dollar for debts greater than six years old, and "effectively nothing" for debts greater than 15 years old. *Id.,* at 23–24. These prices

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[2] A case pending before this Court, *Henson* v. *Santander Consumer USA Inc.*, No. 16–349, asks whether a certain kind of debt buyer is a "debt collector" under the FDCPA. Midland does not dispute that it is a debt collector under the Act.

reflect the basic fact that older debts are harder to collect. As time passes, consumers move or forget that they owe the debts; creditors have more trouble documenting the debts and proving their validity; and debts begin to fall within state statutes of limitations—time limits that "operate to bar a plaintiff's suit" once passed. *CTS Corp.* v. *Waldburger*, 573 U. S. ___, ___ (2014) (slip op., at 5). Because a creditor (or a debt collector) cannot enforce a time-barred debt in court, the debt is inherently worth very little indeed.

But statutes of limitations have not deterred debt buyers. For years, they have filed suit in state courts—often in small-claims courts, where formal rules of evidence do not apply—to collect even debts too old to be enforced by those courts.[3] See Holland, The One Hundred Billion Dollar Problem in Small-Claims Court, 6 J. Bus. & Tech. L. 259, 261 (2011). Importantly, the debt buyers' only hope in these cases is that consumers will fail either to invoke the statute of limitations or to respond at all: In most States the statute of limitations is an affirmative defense, meaning that a consumer must appear in court and raise it in order to dismiss the suit. See *ante,* at 4–5 (majority opinion). But consumers do fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all. FTC Report 45. The result is that debt buyers have won "billions of dollars in default judgments" simply by filing suit and betting that consumers will lack the resources to respond. Holland, *supra,* at 263.

The FDCPA's prohibitions on "misleading" and "unfair" conduct have largely beaten back this particular practice. Every court to have considered the question has held that

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[3] Petitioner's parent alone filed 245,000 lawsuits in 2009. See Silver-Greenberg, Boom in Debt Buying Fuels Another Boom—in Lawsuits, Wall Street Journal, Nov. 29, 2010, pp. A1, A16. Petitioner itself filed 110 lawsuits on just one date in a single state court. *Id.,* at A1.

a debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA. See *Phillips* v. *Asset Acceptance, LLC*, 736 F. 3d 1076, 1079 (CA7 2013); *Kimber* v. *Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (MD Ala. 1987); see also *ante,* at 5–6 (majority opinion) (citing other cases). In 2015, petitioner and its parent company entered into a consent decree with the Government prohibiting them from filing suit to collect time-barred debts and ordering them to pay $34 million in restitution. See Consent Order in *In re Encore Capital Group, Inc.*, No. 2015–CFPB–0022 (Sept. 9, 2015), pp. 38, 46. And the leading trade association has now adopted a resolution barring the practice. See Brief for DBA International, Inc., as *Amicus Curiae* 2–3.

Stymied in state courts, the debt buyers have now turned to a new forum: bankruptcy courts. The same debt buyers that for years filed thousands of lawsuits in state courts across the country have begun to do the same thing in bankruptcy courts—specifically, in cases governed by Chapter 13 of the Bankruptcy Code, which allows consumers earning regular incomes to restructure their debts and repay as many as they can over a period of several years. See 8 Collier on Bankruptcy ¶1300.01 (A. Resnick & H. Sommer eds., 16th ed. 2016). As in ordinary civil cases, a debtor in a Chapter 13 bankruptcy proceeding is entitled to have dismissed any claim filed against his estate that is barred by a statute of limitations. See 11 U. S. C. §558. As in ordinary civil cases, the statute of limitations is an affirmative defense, one that must be raised by either the debtor or the trustee of his estate before it is honored. §§502, 558. And so—just as in ordinary civil cases—debt collectors may file claims in bankruptcy proceedings for stale debts and hope that no one notices that they are too old to be enforced.

And that is exactly what the debt buyers have done. As a wide variety of courts and commentators have observed,

debt buyers have "deluge[d]" the bankruptcy courts with claims "on debts deemed unenforceable under state statutes of limitations." *Crawford* v. *LVNV Funding, LLC*, 758 F. 3d 1254, 1256 (CA11 2014); see also *In re Jenkins*, 456 B. R. 236, 239, n. 2 (Bkrtcy. Ct. EDNC 2011) (noting a "plague of stale claims"); Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 9 (noting study describing "hundreds of thousands of proofs of claim asserting hundreds of millions of dollars of consumer indebtedness, all in a single year"). This practice has become so widespread that the Government sued one debt buyer last year "to address [its] systemic abuse of the bankruptcy process"—including a "business model" of "knowingly and strategically" filing thousands of claims for time-barred debt. Complaint in *In re Freeman-Clay* v. *Resurgent Capital Servs., L.P.*, No. 14–41871 (Bkrtcy. Ct. WD Mo.), ¶¶1, 35 (*Resurgent* Complaint). This practice, the Government explained, "manipulates the bankruptcy process by systematically shifting the burden" to trustees and debtors to object even to "frivolous claims"—especially given that filing an objection is costly, time consuming, and easy to overlook. *Id.,* at ¶¶35, 43–44.

II

The FDCPA prohibits professional debt collectors from engaging in "unfair" and "unconscionable" practices. 15 U. S. C. §1692f.[4] Filing a claim in bankruptcy court for

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[4] This Court has not had occasion to construe the terms "unfair" and "unconscionable" in §1692f. The FDCPA's legislative history suggests that Congress intended these terms as a backstop that would enable "courts, where appropriate, to proscribe other improper conduct . . . not specifically addressed" by the statute. S. Rep. No. 95–382, p. 4 (1977). Courts have construed these terms, consistent with other federal and state statutes that employ them, to borrow from equitable and common-law traditions. See, *e.g., LeBlanc* v. *Unifund CCR Partners*, 601 F. 3d 1185, 1200–1201 (CA11 2010) (*per curiam*); *Beler* v. *Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F. 3d 470, 473–474 (CA7 2007).

debt that a collector knows to be time barred—like filing a lawsuit in a court to collect such a debt—is just such a practice.

A

Begin where the debt collectors themselves began: with their practice of filing suit in ordinary civil courts to collect debts that they know are time barred. Every court to have considered this practice holds that it violates the FDCPA. There is no sound reason to depart from this conclusion.

Statutes of limitations "are not simply technicalities." *Board of Regents of Univ. of State of N. Y.* v. *Tomanio*, 446 U. S. 478, 487 (1980). They reflect strong public-policy determinations that "it is unjust to fail to put [an] adversary on notice to defend within a specified period of time." *United States* v. *Kubrick*, 444 U. S. 111, 117 (1979). And they "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348–349 (1944). Such concerns carry particular weight in the context of small-dollar consumer debt collection. As one thoughtful opinion explains:

> "Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense . . . ." *Kimber*, 668 F. Supp., at 1487.

Debt buyers' efforts to pursue stale debt in ordinary civil

litigation may also entrap debtors into forfeiting their time defenses altogether. When a debt collector sues or threatens to sue to collect a debt, many consumers respond by offering a small partial payment to forestall suit. In many States, a consumer who makes an offer like this has—unbeknownst to him—forever given up his ability to claim the debt is unenforceable. That is because in most States a consumer's partial payment on a time-barred debt—or his promise to resume payments on such a debt—will restart the statute of limitations. FTC Report 47; see, *e.g., Young* v. *Sorenson*, 47 Cal. App. 3d 911, 914, 121 Cal. Rptr. 236, 237 (1975) ("'The theory on which this is based is that the payment is an acknowledgement on the existence of the indebtedness which raises an implied promise to continue the obligation and to pay the balance'"). Debt collectors' efforts to entrap consumers in this way have no place in honest business practice.

B

The same dynamics are present in bankruptcy proceedings. A proof of claim filed in bankruptcy court represents the debt collector's belief that it is entitled to payment, even though the debt should not be enforced as a matter of public policy. The debtor's claim will be allowed, and will be incorporated in a debtor's payment plan, unless the debtor or his trustee objects. But such objections require ordinary and unsophisticated people (and their overworked trustees) to be on guard not only against mistaken claims but also against claims that debt collectors know will fail under law if an objection is raised. Debt collectors do not file these claims in good faith; they file them hoping and expecting that the bankruptcy system will fail. Such a practice is "unfair" and "unconscionable" in violation of the FDCPA.

The Court disagrees. But it does so on narrow grounds. To begin with, the Court does not hold that the Bankruptcy

Code altogether displaces the FDCPA, leaving it with no role to play in bankruptcy proceedings. Such a conclusion would be wrong. Although the Code and the FDCPA "have different purposes and structural features," *ante,* at 8, the Court has held that Congress, in passing the FDCPA's predecessor, did so on the understanding that "the provisions and the purposes" of the two statutes were intended to "coexist." *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974). Although petitioner suggests that the FDCPA is best read "to have no application to [a] debt collector's conduct" in a bankruptcy proceeding, Brief for Petitioner 41, the majority declines its invitation to adopt such a sweeping rule.[5]

Nor does the majority take a position on whether a debt collector violates the FDCPA by filing suit in an ordinary court to collect a debt it knows is time barred. *Ante,* at 6. Instead, the majority concludes, even assuming that such a practice would violate the FDCPA, a debt collector does

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[5] The majority does lean heavily on its fear that, were we to conclude that the FDCPA bars the practice at issue, we would be licensing "postbankruptcy litigation in an ordinary civil court" concerning matters best left to bankruptcy courts. *Ante,* at 9. But to do so would not, as the majority suggests, "upset [the] 'delicate balance'" struck by the Code. *Ibid.* (quoting *Kokoszka* v. *Belford*, 417 U. S., at 651). For one, nothing requires a debtor to engage in satellite litigation in order to sue a debt collector under the FDCPA; a debtor can easily file an adversary proceeding asserting an FDCPA claim with the bankruptcy court itself, and in many cases will be better served by doing so. See, *e.g., Simon* v. *FIA Card Servs., N. A.*, 732 F. 3d 259, 263 (CA3 2013). Nor is there any risk that finding the FDCPA applicable here will authorize bankruptcy courts (or, for that matter, civil courts) to engage in novel and unfettered inquiries into "a creditor's state of mind." *Ante,* at 9. Both Fed. Rule Civ. Proc. 11 and its bankruptcy counterpart, Fed. Rule Bkrtcy. Proc. 9011, authorize a court to impose sanctions on parties who willfully file meritless claims (a category that includes the debt buyers here, see *In re Sekema*, 523 B. R. 651, 654–655 (Bkrtcy. Ct. ND Ind. 2015)). So there is nothing new about the inquiry that courts would be required to undertake; it is no different than analyses they conduct every day.

not violate the Act by doing the same thing in bankruptcy proceedings. Bankruptcy, the majority argues, is different. True enough. But none of the distinctions that the majority identifies bears the weight placed on it.

First, the majority contends, structural features of the bankruptcy process reduce the risk that a stale debt will go unnoticed and thus be allowed. *Ante,* at 6–7. But there is virtually no evidence that the majority's theory holds true in practice. The majority relies heavily on the presence of a bankruptcy trustee, appointed to act on the debtor's behalf and empowered to (among other things) object to claims that he believes lack merit. See 11 U. S. C. §§704(a)(5), 1302(b). In the majority's view, the trustee's gatekeeping role makes it "considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection, and disallowance." *Ante,* at 7. The problem with the majority's *ipse dixit* is that everyone with actual experience in the matter insists that it is false. The Government, which oversees bankruptcy trustees, tells us that trustees "cannot realistically be expected to identify every time-barred . . . claim filed in every bankruptcy." Brief for United States as *Amicus Curiae* 25–26; see also *Resurgent* Complaint ¶43 ("Filing objections to all of [one collector]'s unenforceable claims would clog the docket of this Court and other courts with objections to frivolous claims"). The trustees themselves (appearing here as *amici curiae*) agree, describing the practice as "wasteful" and "exploit[ative]." Brief for National Association of Chapter Thirteen Trustees as *Amicus Curiae* 12. And courts across the country recognize that Chapter 13 trustees are struggling under a "deluge" of stale debt. *Crawford*, 758 F. 3d, at 1256.

Second, the other features of the bankruptcy process that the majority believes will serve as a backstop against frivolous claims are even less likely to do so in practice. The majority implies that a person who files for bankruptcy

is more sophisticated than the average consumer debtor because the initiation of bankruptcy is a choice made by a debtor. *Ante,* at 6. But a person who has filed for bankruptcy will rarely be in such a superior position; he has, after all, just declared that he is unable to meet his financial obligations and in need of the assistance of the courts. It is odd to speculate that such a person is better situated to monitor court filings and lodge objections than an ordinary consumer. The majority also suggests that the rules of bankruptcy help "guide the evaluation of claims." *Ibid.* But the rules of bankruptcy in fact facilitate the *allowance* of claims: Claims are automatically allowed and made part of a plan unless an objection is made. See 11 U. S. C. §502(a). A debtor is arguably more vulnerable in bankruptcy—not less—to the oversights that the debt buyers know will occur.

Finally, the majority suggests, in some cases a consumer will actually *benefit* if a claim for an untimely debt is filed. *Ante,* at 7–8. If such a claim is filed but disallowed, the majority explains, the debt will eventually be discharged, and the creditor will be barred from collecting it. See §1328(a). Here, too, practice refutes the majority's rosy portrait of these proceedings. A debtor whose trustee does not spot and object to a stale debt will find no comfort in the knowledge that *other* consumers with more attentive trustees may have their debts disallowed and discharged. Moreover, given the high rate at which debtors are unable to fully pay off their debts in Chapter 13 proceedings, see Porter, The Pretend Solution: An Empirical Study of Bankruptcy Outcomes, 90 Texas L. Rev. 103, 111–112 (2011), most debtors who fail to object to a stale claim will end up worse off than had they never entered bankruptcy at all: They will make payments on the stale debts, thereby resuscitating them, see *supra*, at 6–7, and may thus walk out of bankruptcy court owing more to their creditors than they did when they entered it. There is no benefit to

anyone in such a proceeding—except the debt collectors.

* * *

It does not take a sophisticated attorney to understand why the practice I have described in this opinion is unfair. It takes only the common sense to conclude that one should not be able to profit on the inadvertent inattention of others. It is said that the law should not be a trap for the unwary. Today's decision sets just such a trap.

I take comfort only in the knowledge that the Court's decision today need not be the last word on the matter. If Congress wants to amend the FDCPA to make explicit what in my view is already implicit in the law, it need only say so.

I respectfully dissent.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11240

D.C. Docket No. 1:14-cv-00322-WS-C

ALEIDA JOHNSON,
f.k.a. Aleida Hill,
individually and on behalf of all similarly situated individuals,

Plaintiff-Appellant,

versus

MIDLAND FUNDING, LLC,

Defendant-Appellee.

No. 15-14116

D.C. Docket No. 1:14-cv-00324-WS-M

JUDY N. BROCK,
individually and on behalf of a class of others similarly situated,
DONALD CUNNINGHAM,

Plaintiffs-Appellants,

versus

RESURGENT CAPITAL SERVICES, L.P.,
LVNV FUNDING, LLC,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Alabama

(May 24, 2016)

Before WILSON, MARTIN and HIGGINBOTHAM,* Circuit Judges.

MARTIN, Circuit Judge:

Under the Bankruptcy Code ("Code"), a "creditor . . . may file a proof of claim" in a bankruptcy proceeding. 11 U.S.C. § 501(a). The Fair Debt Collection Practices Act ("FDCPA") prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This Court held that a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred. Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014). In considering this case below, the District Court interpreted the Crawford ruling as having placed the FDCPA and the Code in irreconcilable

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*Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

conflict. We see no such conflict. Although the Code certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability. A particular subset of creditors—debt collectors—may be liable under the FDCPA for bankruptcy filings they know to be time-barred. Because we find no irreconcilable conflict between the FDCPA and the Code, we reverse.

I.

Aleida Johnson filed a Chapter 13 bankruptcy petition in March 2014. In May 2014, Midland Funding, LLC ("Midland") filed a proof of claim in her case, seeking payment of $1,879.71. Midland is a buyer of unpaid debt. Specifically, Midland purchases accounts with overdue unpaid balances and tries to collect those accounts. Midland's claim against Ms. Johnson originated with Fingerhut Credit Advantage, and the date of the last transaction on her account was listed as May 2003. This was over ten years before Ms. Johnson filed for bankruptcy. The claim arose in Alabama, where the statute of limitations for a creditor to collect an overdue debt is six years. See Ala. Code § 6-2-34.

Judy Brock also filed a Chapter 13 bankruptcy petition. Ms. Brock filed her petition in April 2014; in June 2014, Resurgent Capital Services, L.P. ("Resurgent") filed a proof of claim seeking payment of $4,155.40. Resurgent is a "manager and servicer of domestic and international consumer debt portfolios for

credit grantors and debt buyers." Resurgent's filing was an attempt to collect Ms. Brock's debt on behalf of LVNV Funding, LLC, which is a purchaser of unpaid debt like Midland. Ms. Brock's debt originated with Washington Mutual Bank, N.A., and the date of the last transaction on her account was January 2008. There had been no activity on her account for over six years before Ms. Brock filed for bankruptcy.

Ms. Johnson and Ms. Brock (together, "Debtors") sued their respective creditors (together, "Claimants") under the FDCPA. The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes attempting to collect a debt that is not "expressly authorized by the agreement creating the debt or permitted by law." Id. § 1692f(1). Both Debtors alleged in their lawsuits that the claims on their face were barred by the relevant statute of limitations. They argued that the proofs of claim were thus "'unfair,' 'unconscionable,' 'deceptive,' and misleading" in violation of the FDCPA.

Midland moved to dismiss Ms. Johnson's FDCPA suit, and the District Court granted the motion. The District Court read the Bankruptcy Code as affirmatively authorizing a creditor to file a proof of claim—including one that is time-barred—if that creditor has a "right to payment" that has not been extinguished under applicable state law. The District Court identified tension

between this provision of the Code and the FDCPA, which makes it unlawful to file a proof of claim known to be time-barred. The court found this conflict to be irreconcilable and applied the doctrine of implied repeal to hold that a creditor's right to file a time-barred claim under the Code precluded debtors from challenging that practice as a violation of the FDCPA in the Chapter 13 bankruptcy context.

In Ms. Brock's later FDCPA suit, the District Court granted Resurgent's motion for judgment on the pleadings based on the rationale and holding in Ms. Johnson's case. The two cases were consolidated for this appeal.

II.

We review de novo the District Court's grant of a motion to dismiss for failure to state a claim. Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1275 (11th Cir. 2013). Like the District Court, we accept the allegations in the complaint as true and construe the facts in the light most favorable to the plaintiff. Id. We apply the same standard of review to the District Court's judgment on the pleadings. See Horsley v. Feldt, 304 F.3d 1125, 1131 (11th Cir. 2002). Judgment on the pleadings is appropriate "when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." Ortega v. Christian, 85 F.3d 1521, 1524 (11th Cir. 1996).

III.

The Debtors argue on appeal that the District Court's decision conflicts with our Circuit's precedent in Crawford. Again, Crawford held that a debt collector violates the FDCPA by knowingly filing a proof of claim in a bankruptcy proceeding on a debt that is time-barred. 758 F.3d at 1261. The Debtors here pursue their argument that the Code does not preclude this type of FDCPA claim simply because the claim was made in the context of a Chapter 13 bankruptcy case.

A.

In Crawford, this Court faced a question nearly identical to the one we consider here: "whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the [FDCPA]." 758 F.3d at 1256. We concluded there was an FDCPA violation in Crawford, based on "[t]he FDCPA's broad language, our precedent, and the record." Id. at 1257.

The Crawford panel first looked to the language of the FDCPA, which prohibits a "false, deceptive, or misleading representation," 15 U.S.C. § 1692e, or "unfair or unconscionable means," id. § 1692f, to collect on a debt. 758 F.3d at 1258. Because of the ambiguity in these terms, the Court adopted a "'least-sophisticated consumer' standard" to evaluate whether a debt collector's conduct was deceptive under the FDCPA. Id. It then concluded that "[s]imilar to the filing of a stale lawsuit," which is prohibited by the FDCPA for debts on which the statute of limitations has run, "a debt collector's filing of a time-barred proof of

claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt." Id. at 1261. This impression causes problems because "[t]he 'least sophisticated' Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to object to such a claim." Id. Then when the debtor fails to object, the time-barred debt becomes part of the debtor's repayment plan, which would "necessarily reduce[] the payments to other legitimate creditors with enforceable claims." Id. Thus Crawford held that the practice of filing time-barred proofs of claim was misleading under the FDCPA. Id.

In a footnote, the panel said it "decline[d] to weigh in on a topic the district court artfully dodged: Whether the Code 'preempts' the FDCPA when creditors misbehave in bankruptcy." Id. at 1262 n.7. The Court said it "need not address this issue" because the claimant there "argue[d] only that its conduct does not fall under the FDCPA, or, alternatively, did not offend the FDCPA's prohibitions" and it "d[id] not contend that the Bankruptcy Code displaces or 'preempts' §§ 16923 and 1692f of the FDCPA." Id.

B.

We now answer the question left open in Crawford. The Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred. We

recognize that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations. However, when a particular type of creditor—a designated "debt collector" under the FDCPA—files a knowingly time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA. Our examination of these statutes leads us to conclude that the Code and the FDCPA can be read together in a coherent way.

1.

Under the Bankruptcy Code, a "creditor . . . may file a proof of claim" in a debtor's bankruptcy. 11 U.S.C. § 501(a). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. § 101(5)(A). The Supreme Court interprets this language to create an "entitle[ment]" for creditors to file a proof of claim in a bankruptcy proceeding where a "right to payment" exists. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 449, 127 S. Ct. 1199, 1204 (2007) (quotation omitted). A "right to payment" under the Bankruptcy Code "is nothing more nor less than an enforceable obligation." Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 559, 110 S. Ct. 2126, 2131 (1990).

The Debtors argue that there is no "right" to file a time-barred claim when there is no right to have that claim repaid in a Chapter 13 bankruptcy proceeding. We reject this argument, because the Code does allow claims in a Chapter 13 bankruptcy proceeding by a party who does not necessarily have a right to have his claim paid. See In re McLean, 794 F.3d 1313, 1321 (11th Cir. 2015) ("[T]he Bankruptcy Code explicitly contemplates that creditors may file unenforceable claims in the bankruptcy court."). And having a claim is not the same as being entitled to a remedy. Indeed, Alabama law, which governs the right of the Claimants to recover here, provides that "[w]hen the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable." In re HealthSouth Corp., 974 So. 2d 288, 296 (Ala. 2007). So although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place. See id.

As the District Court pointed out, the Bankruptcy Code's procedure for addressing proofs of claim demonstrates that some filed claims will not ultimately be paid in a bankruptcy proceeding. Where a proof of claim is filed in a bankruptcy case, that claim is generally "deemed allowed," so it will be viewed as a valid claim and paid out of the bankruptcy estate. 11 U.S.C. § 502(a). However, the bankruptcy trustee is charged with "examin[ing] proofs of claim and object[ing] to the allowance of any claim that is improper." Id. § 704(a)(5); see

also id. at § 1302(b)(1). Once the trustee objects, the bankruptcy court is in turn charged with determining whether the claim "is unenforceable against the debtor . . . under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." Id. § 502(b)(1); see also id. § 558 ("The [bankruptcy] estate shall have the benefit of any defense available to the debtor . . . including statutes of limitation."). Thus, where the bankruptcy process is working as intended, a time-barred proof of claim may be filed but will not be paid by the bankruptcy estate.

2.

So while we recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims. The FDCPA does not allow a debt collector to "use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Neither may they "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Id. § 1692e. A debt collector who violates one of these rules may face civil liability to the debtor. Id. § 1692k. As this Court recognized in Crawford, a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding. 758 F.3d at 1261.

Of course, the FDCPA does not reach all creditors. The statute applies only to "debt collectors," who are defined as "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). And "debt collectors" are a narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy. Under the Code, any "creditor" (defined as any "entity that has a claim against the debtor that arose at the time of or before the [bankruptcy] order") may file a proof of claim. 11 U.S.C. § 101(10)(A). So not all "creditors" who file a proof of claim in a Chapter 13 bankruptcy case can face potential FDCPA liability as "debt collectors."

Also, the FDCPA provides a safe harbor for debt collectors who might unintentionally or in good faith file such a claim. See 15 U.S.C. § 1692k(c). A debt collector who appears to have violated the FDCPA can avoid liability by showing (by a preponderance of evidence) that their violation "was not intentional and resulted from a bona fide error." Id. These two requirements—that the claim be filed by a "debt collector" and that the claim be "knowingly" time-barred—limit application of the FDCPA to a narrow range of actors and claims.

3.

The District Court found an "obvious tension" between the Bankruptcy Code and the FDCPA because "the Code permits creditors to file proofs of claim

in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct." Based on its perception that this is an "irreconcilable conflict," the District Court found that the later-enacted Code impliedly repealed the earlier-enacted FDCPA. In that court's view, this prohibited the Debtors from seeking FDCPA remedies against the Claimants who had filed proofs of claim in their Chapter 13 bankruptcy cases.

Where two federal statutes conflict, a cause of action provided by one statute may be precluded by the provisions of the other. See POM Wonderful LLC v. Coca-Cola Co., ___ U.S. ___, ___, 134 S. Ct. 2228, 2236 (2014). Where there is such an "irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503, 56 S. Ct. 349, 352 (1936) (quotation omitted). However, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662, 127 S. Ct. 2518, 2532 (2007) (quotations omitted) (alteration adopted).

This is to say that courts must be modest in construing a repeal by implication. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S.

124, 143–44, 122 S. Ct. 593, 605 (2001) (quotation omitted). For irreconcilable conflict to exist there must usually be some sort of "positive repugnancy" between the statutes at issue, because two statutes can typically coexist if they simply contain "different requirements and protections." Id. We will not infer a statutory repeal unless either the later statute expressly contradicts the earlier statute or this construction "is absolutely necessary" in order for the later statute to "have any meaning at all." Nat'l Ass'n of Home Builders, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The FDCPA and the Code are not in irreconcilable conflict. The FDCPA and the Code differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist. See POM Wonderful LLC, 134 S. Ct. at 2238 (finding two federal statutes complementary to each other when they touched on the same general subject matter but each "ha[d] its own scope and purpose" and "impose[d] different requirements and protections" (quotation omitted)). There is no "positive repugnancy" between the statutes, because reading the two statutes as we described does not create such an express contradiction that implied repeal of the FDCPA "is absolutely necessary" in order for § 501(a) of the Bankruptcy Code (which creates the right to file a claim) to "have any meaning at all." Nat'l Ass'n of Home Builders, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The Bankrupty Code and the FDCPA can be reconciled because they provide different protections and reach different actors. See J.E.M. Ag Supply, Inc., 534 U.S. at 142, 122 S. Ct. at 604 (finding no irreconcilable conflict where two regimes regulate at different levels of stringency and provide varying amounts of protection). The Code allows all "creditors" to file proofs of claim, see 11 U.S.C. § 101(10)(A), while the FDCPA dictates the behavior of only "debt collectors" both within and outside of bankruptcy, see 15 U.S.C. § 1692a(6). The Code establishes the ability to file a proof of claim, see 11 U.S.C. § 105(a), while the FDCPA addresses the later ramifications of filing a claim, see Crawford, 758 F.3d at 1257.

We read these regimes together as providing different tiers of sanctions for creditor misbehavior in bankruptcy. Cf. POM Wonderful LLC, 134 S. Ct. at 2238 ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). In a Chapter 13 bankruptcy proceeding, the first potential line of protection against a creditor who files a time-barred proof of claim is for the bankruptcy trustee to object to the claim during the course of the bankruptcy proceedings. See 11 U.S.C. §§ 704(a)(5), 1302(b)(1). If the bankruptcy court finds the objection to be proper, it can deny payment of the claim. See id. § 502(b)(1). Where a creditor's misbehavior is more severe, the

Code provides a more powerful remedy. Bankruptcy courts have the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]," such as issuing sanctions against a party for misbehavior. Id. § 105(a).

The FDCPA easily lies over the top of the Code's regime, so as to provide an additional layer of protection against a particular kind of creditor. It kicks in only when the creditor is a debt collector that "regularly collects" or is in "any business the principal purpose of which is the collection" of debts. 15 U.S.C. § 1692a(6). And even then, the requirement for finding a violation is quite stringent—the creditor's behavior must reach the point of "unconsionab[ility]" or "decepti[on]." Id. §§ 1692e, 1692f. It is only under these circumstances that the FDCPA offers the severe remedy of civil liability for damages to the debtor. See id. § 1692k(a).

We thus conclude that the FDCPA and the Code can coexist. Our holding does not infringe any creditor's ability to file a claim in a debtor's bankruptcy proceeding. However, when a debt collector, as specifically defined by the FDCPA, files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a "misleading" or "unfair" claim. The Bankruptcy Code's rules about who can file

claims do not shield debt collectors from the obligations that Congress imposed on them.

We reject the Claimants' assertion that potential consequences under the FDCPA for filing a time-barred proof of claim effectively forces a debt collector to "surrender[] its right to file a proof of claim." This argument misunderstands the relationship between the two statutes. There is no blanket prohibition on filing a time-barred claim in bankruptcy, and we say nothing to the contrary here.[1] In the same way, the Bankruptcy Code does not require any creditor to file a proof of claim in a bankruptcy proceeding—it only allows it. See 11 U.S.C. § 501(a). If a debt collector chooses to file a time-barred claim, he is simply opening himself up to a potential lawsuit for an FDCPA violation. This result is comparable to a party choosing to file a frivolous lawsuit. There is nothing to stop the filing, but afterwards the filer may face sanctions. See Fed. R. Civ. P. 11(b)–(c).

In closing, we observe that our conclusion that there is no "positive repugnancy" between the FDCPA and the Bankruptcy Code is bolstered by two additional facts. First, no provision in either the FDCPA or the Code "purports to govern the relevant interaction between the [two statutes]." POM Wonderful LLC, 134 S. Ct. at 2237. Second, Congress never expressed a "clear and manifest intent"

[1] Such an outcome would be inappropriate, because the FDCPA recognizes and provides a safe harbor for creditors who may file proofs of claim that are time-barred, if those filings arose from a good-faith belief resulting from a recording error that the statute of limitations had not in fact run on the claim. See 15 U.S.C. § 1692k(c).

to repeal the protections of the FDCPA when it enacted the Bankruptcy Code only one year later. See Nat'l Ass'n of Home Builders, 551 U.S. at 662, 127 S. Ct. at 2532. Because the FDCPA and the Bankruptcy Code may be read to coexist, the Code does not preclude an FDCPA claim in the bankruptcy context.

IV.

This dispute reveals no irreconcilable conflict between the Bankruptcy Code and the FDCPA. A creditor may file a proof of claim in a Chapter 13 bankruptcy proceeding under the Code. However, when that creditor is also a "debt collector" as defined by the FDCPA, the creditor may be liable under the FDCPA for "misleading" or "unfair" practices when it files a proof of claim on a debt that it knows to be time-barred, and in doing so "creates the misleading impression to the debtor that the debt collector can legally enforce the debt." Crawford, 758 F.3d at 1261. Because the Debtors' FDCPA claims are not precluded by the Bankruptcy Code, we reverse and remand to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12389

D.C. Docket No. 2:12-cv-00701-WKW,
Bkcy No. 08-bk-30192-DHW

STANLEY CRAWFORD,

Plaintiff - Appellant,

versus

LVNV FUNDING, LLC, et al.,

Defendants – Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(July 10, 2014)

Before HULL, Circuit Judge, and WALTER,* District Judge, and GOLDBERG,** Judge

GOLDBERG, Judge:

A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations. This appeal considers whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the Fair Debt Collection Practices Act ("FDCPA" or "Act"). 15 U.S.C. §§ 1692−1692p (2006).

We answer this question affirmatively. The FDCPA's broad language, our precedent, and the record compel the conclusion that defendants' conduct violated a number of the Act's protective provisions. See id. §§ 1692(e), 1692d−1692f. We hence reverse the orders of the bankruptcy and district courts.

I. FACTS[1]

*Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

**Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

Stanley Crawford, the plaintiff in this case, owed $2,037.99 to the Heilig-Meyers furniture company. Heilig-Meyers charged off this debt in 1999, and in September 2001, a company affiliated with defendant LVNV Funding, LLC, acquired the debt from Heilig-Meyers.[2] The last transaction on the account occurred one month later on October 26, 2001. Accordingly, under the three-year Alabama statute of limitations that governed the account, Crawford's debt became unenforceable in both state and federal court in October 2004. See Ala. Code § 6-2-37(1).

Then, on February 2, 2008, Crawford filed for Chapter 13 bankruptcy in the Middle District of Alabama. During the proceeding, LVNV filed a proof of claim to collect the Heilig-Meyers debt, notwithstanding that the limitations period had expired four years earlier. In response, Crawford filed a counterclaim against LVNV via an adversary proceeding pursuant to Bankruptcy Rule 3007(b). Crawford alleged that LVNV filed stale claims as a routine business practice and that attempting to claim Crawford's time-barred debt violated the FDCPA.

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[1] LVNV's motion to dismiss Crawford's adversary proceeding is governed by Federal Rule of Civil Procedure 12(b)(6). See Fed. R. Bankr. P. 7012(b) (providing that Federal Rule Civil Procedure 12(b) "applies in adversary proceedings"). Accordingly, we accept the allegations in Crawford's complaint "as true and constru[e] them in the light most favorable to [Crawford]." Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1275 (11th Cir. 2012) (quotation marks omitted).

[2] The other defendants in this case are Resurgent Capital Services, L.P., and PRA Receivables Management, LLC. According to the complaint, LVNV filed the time-barred proof of claim "by and through" Resurgent in May 2008, and LVNV transferred the claim to PRA Receivables in September 2010. We refer to defendants collectively as "LVNV."

Bankruptcy Judge Dwight H. Williams, Jr., dismissed Crawford's adversary proceeding in its entirety. Crawford then appealed to the district court, but Chief Judge W. Keith Watkins affirmed. Crawford v. LVNV Funding, LLC, Nos. 2:12–CV–701–WKW, 2:12–CV–729–WKW, 2013 WL 1947616 (M.D. Ala. May 9, 2013). Crawford appealed to us on May 24, 2013.

II. THE FDCPA

To decide this case, we must first examine the statute that governs Crawford's claim: the FDCPA. The FDCPA is a consumer protection statute that "imposes open-ended prohibitions on, inter alia, false, deceptive, or unfair" debt-collection practices. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 587, 130 S. Ct. 1605, 1615 (2010) (quotation marks and citations omitted). Finding "abundant evidence" of such practices, Congress passed the FDCPA in 1977 to stop "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress determined that "[e]xisting laws and procedures" were "inadequate" to protect consumer debtors. Id. at § 1692(b); see Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1173 (11th Cir. 1985) (noting "that despite prior [Federal Trade Commission] enforcement in the area," Congress found "[e]xisting laws and procedures" inadequate).

In short, the FDCPA regulates the conduct of debt-collectors, which the statute defines as any person who, inter alia, "regularly collects . . . debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Undisputedly, LVNV and its surrogates are debt collectors and thus subject to the FDCPA.[3]

To enforce the FDCPA's prohibitions, Congress equipped consumer debtors with a private right of action, rendering "debt collectors who violate the Act liable for actual damages, statutory damages up to $1,000, and reasonable attorney's fees and costs." Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1270 (11th Cir. 2011) (citing 15 U.S.C. § 1692k(a)); Jeter, 760 F.2d at 1174 n.5 ("Most importantly, consumers were given a private right of action to enforce the provisions of the FDCPA against debt collectors . . . ."). To determine whether LVNV's conduct, as alleged in Crawford's complaint, is prohibited by the FDCPA, we begin "where all such inquiries must begin: with the language of the statute itself." Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1216 (11th Cir. 2012) (quotation marks omitted).

Section 1692e of the FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 1692f states that "[a] debt

[3] It is worth noting that the FDCPA does not apply to all creditors; it applies only to professional debt-collectors like LVNV.

collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Id. § 1692f.

Because Congress did not provide a definition for the terms "unfair" or "unconscionable," this Court has looked to the dictionary for help. "The plain meaning of 'unfair' is 'marked by injustice, partiality, or deception.'" LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1200 (11th Cir. 2010) (quoting Merriam–Webster Online Dictionary (2010)). Further, "an act or practice is deceptive or unfair if it has the tendency or capacity to deceive." Id. (quotation marks omitted and alterations adopted). We also explained that "[t]he term 'unconscionable' means 'having no conscience'; 'unscrupulous'; 'showing no regard for conscience'; 'affronting the sense of justice, decency, or reasonableness.'" Id. (quoting Black's Law Dictionary 1526 (7th ed. 1999)). We have also noted that "[t]he phrase 'unfair or unconscionable' is as vague as they come." Id. (quoting Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 480 F.3d 470, 474 (7th Cir. 2007)).

Given this ambiguity, we have adopted a "least-sophisticated consumer" standard to evaluate whether a debt collector's conduct is "deceptive," "misleading," "unconscionable," or "unfair" under the statute. LeBlanc, 601 F.3d at 1193-94, 1200-01 (holding that the "least-sophisticated consumer" standard applies to evaluate claims under both § 1692e and § 1692f); see also Jeter, 760

F.2d at 1172-78 (reversing the district court's use of the "reasonable consumer" standard in a §1692e case). The inquiry is not whether the particular plaintiff-consumer was deceived or misled; instead, the question is "whether the 'least sophisticated consumer' would have been deceived" by the debt collector's conduct. Jeter, 760 F.2d at 1177 n.11. The "least-sophisticated consumer" standard takes into account that consumer-protection laws are "not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous." Id. at 1172-73 (quotation marks omitted). "However, the test has an objective component in that while protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." LeBlanc, 601 F.3d at 1194 (quotation marks omitted and alterations adopted).

Given our precedent, we must examine whether LVNV's conduct—filing and trying to enforce in court a claim known to be time-barred—would be unfair, unconscionable, deceiving, or misleading towards the least-sophisticated consumer. See id. at 1193-94; see also Jeter, 760 F.2d at 1172-78.[4]

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[4] The FDCPA is generally described as a "strict liability" statute. LeBlanc, 601 F.3d at 1190. Nevertheless, a debt collector's knowledge and intent can be relevant—for example, a debt collector can avoid liability if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C § 1692k(c). At this juncture in the case and for purposes of this appeal, LVNV does not dispute that it knew that the debt was time-barred.

III. DISCUSSION

The reason behind LVNV's practice of filing time-barred proofs of claim in bankruptcy court is simple. Absent an objection from either the Chapter 13 debtor or the trustee, the time-barred claim is automatically allowed against the debtor pursuant to 11 U.S.C. § 502(a)-(b) and Bankruptcy Rule 3001(f). As a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court.

That is what happened in this case. LVNV filed the time-barred proof of claim in May of 2008, shortly after debtor Crawford petitioned for Chapter 13 protection. But neither the bankruptcy trustee nor Crawford objected to the claim during the bankruptcy proceeding; instead, the trustee actually paid monies from the Chapter 13 estate to LVNV (or its surrogates) for the time-barred debt.[5] It wasn't until four years later, in May 2012, that debtor Crawford—with the assistance of counsel—objected to LVNV's claim as unenforceable.

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[5] The Bankruptcy Code provides a trustee in every Chapter 13 proceeding. 11 U.S.C. § 1302(a). Statute requires the trustee (among other duties) to appear at hearings, to advise the debtor in nonlegal matters, to ensure the debtor makes timely payments, and, "if a purpose would be served, [to] examine proofs of claims and object to the allowance of any claim that is improper." Id. §§ 1302(b)(1)−(2), (4)−(5), 704(a)(5). Here, however, it appears the trustee failed to fulfill its statutory duty to object to improper claims, specifically LVNV's stale claim.

LVNV acknowledges, as it must, that its conduct would likely subject it to FDCPA liability had it filed a lawsuit to collect this time-barred debt in state court. Federal circuit and district courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f. See Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013) (explaining that a debt collector's filing of a time-barred lawsuit to recover a debt violates the FDCPA); see also Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32-33 (3d Cir. 2011) (indicating that threatened or actual litigation to collect on a time-barred debt violates the FDCPA, but finding no FDCPA violation because the debt-collector never pursued or threatened litigation); Castro v. Collecto, Inc., 634 F.3d 779, 783, 787 (5th Cir. 2011) (collecting cases and indicating that threatened or actual litigation to collect a time-barred debt "may well constitute a violation of [§1692e]," but ultimately concluding that no FDCPA violation occurred because the debt was not time-barred under the applicable statute of limitation); Freyermuth v. Credit Bureau Servs., 248 F.3d 767, 771 (8th Cir. 2001) (same as Huertas, supra); cf. McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 947-49 (9th Cir. 2011) (affirming summary judgment in favor of the consumer after the debt collector filed a time-barred lawsuit to recover a debt).[6]

[6] See also Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870, 875 (N.D. Ill. 2009)

As an example, the Seventh Circuit has reasoned that the FDCPA outlaws "stale suits to collect consumer debts" as unfair because (1) "few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts" and would therefore "unwittingly acquiesce to such lawsuits"; (2) "the passage of time . . . dulls the consumer's memory of the circumstances and validity of the debt"; and (3) the delay in suing after the limitations period "heightens the probability that [the debtor] will no longer have personal records" about the debt. Phillips, 736 F.3d at 1079 (quoting Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (quotation marks omitted)).

These observations reflect the purpose behind statutes of limitations. Such limitations periods "represent a pervasive legislative judgment that it is unjust to

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("Numerous courts, both inside and outside this District, have held that filing or threatening to file suit to collect a time-barred debt violates the FDCPA."); Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009) ("Courts have held that the filing of a time-barred lawsuit violates the FDCPA."); Jenkins v. Gen. Collection Co., 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008) ("[I]t may be inferred from Freyermuth that a violation of the FDCPA has occurred when a debt collector attempts, through threatened or actual litigation, to collect on a time-barred debt that is otherwise valid."); Larsen v. JBC Legal Grp., P.C., 533 F. Supp. 2d 290, 303 (E.D.N.Y. 2008) ("Although it is permissible [under the FDCPA] for a debt collector to seek to collect on a time-barred debt voluntarily, it is prohibited from threatening litigation with respect to such a debt."); Goins v. JBC & Assoc., P.C., 352 F. Supp. 2d 262, 272 (D. Conn. 2005) ("As the statute of limitations would be a complete defense to any suit . . . the threat to bring suit under such circumstances can at best be described as a 'misleading' representation, in violation of § 1692e [of the FDCPA]."); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991) ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (holding that a debt collector's filing of a time-barred lawsuit violated § 1692f).

fail to put the adversary on notice to defend within a specified period of time." United States v. Kubrick, 444 U.S. 111, 117, 100 S. Ct. 352, 356-57 (1979). That is so because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." Id. at 117, 100 S. Ct. at 357 (quoting R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349, 64 S. Ct. 582, 586 (1944)) (quotation marks omitted). Statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." Id.

The same is true in the bankruptcy context. In bankruptcy, the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt. A Chapter 13 debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished, making it difficult for a consumer debtor to defend against the time-barred claim.

Similar to the filing of a stale lawsuit, a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt. The "least sophisticated" Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to

object to such a claim. Given the Bankruptcy Code's automatic allowance provision, the otherwise unenforceable time-barred debt will be paid from the debtor's future wages as part of his Chapter 13 repayment plan. Such a distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims. Furthermore, filing objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court. For all of these reasons, under the "least-sophisticated consumer standard" in our binding precedent, LVNV's filing of a time-barred proof of claim against Crawford in bankruptcy was "unfair," "unconscionable," "deceptive," and "misleading" within the broad scope of §1692e and §1692f.

Any contrary arguments mentioned in the briefs do not alter this conclusion. For example, we disagree with the contention that LVNV's proof of claim was not a "collection activity" aimed at Crawford and, therefore, not "the sort of debt-collection activity that the FDCPA regulates." As noted earlier, the broad prohibitions of § 1692e apply to a debt collector's "false, deceptive, or misleading <u>representation or means</u>" used "<u>in connection with the collection of any debt.</u>" 15 U.S.C. § 1692e (emphases added). The broad prohibitions of §1692f apply to a debt collector's use of "unfair or unconscionable <u>means to collect or attempt to collect any debt.</u>" 15 U.S.C. § 1692f (emphasis added). The FDCPA does not

define the terms "collection of debt" or "to collect a debt" in §§ 1692e or 1692f. However, in interpreting "to collect a debt" as used in § 1692(a)(6), the Supreme Court has turned to the dictionary's definition: "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." Heintz v. Jenkins, 514 U.S. 291, 294, 115 S. Ct. 1489, 1491 (1995) (quoting Black's Law Dictionary 263 (6th ed. 1990)).

Applying these definitions here, we conclude that LVNV's filing of the proof of claim fell well within the ambit of a "representation" or "means" used in "connection with the collection of any debt." It was an effort "to obtain payment" of Crawford's debt "by legal proceeding." In fact, payments to LVNV were made from Crawford's wages as a result of LVNV's claim. And, it was Crawford—not the trustee—who ultimately objected to defendants' claim as time-barred. Our conclusion that §§ 1692e and 1692f apply to LVNV's proof of claim is consistent with the FDCPA's definition of a debt-collector as "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (emphasis added).

LVNV also argues that considering the filing of a proof of claim as a "means" used "in connection with the collection of debt" for purposes §§ 1692e and 1692f of the FDCPA would be at odds with the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(6). We disagree. The automatic stay

prohibits debt-collection activity outside the bankruptcy proceeding, such as lawsuits in state court. See Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348, 354 (5th Cir. 2008) (explaining that the automatic stay "does not determine a creditor's claim but merely suspends an action to collect the claim outside the procedural mechanisms of the Bankruptcy Code"). It does not prohibit the filing of a proof of claim to collect a debt within the bankruptcy process. Filing a proof of claim is the first step in collecting a debt in bankruptcy and is, at the very least, an "indirect" means of collecting a debt. See 15 U.S.C. §§ 1692a(6), 1692e, and 1692f.

Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court.[7]

III. CONCLUSION

[7]The Court also declines to weigh in on a topic the district court artfully dodged: Whether the Code "preempts" the FDCPA when creditors misbehave in bankruptcy. Crawford, 2013 WL 1947616, at *2 n.1. Some circuits hold that the Bankruptcy Code displaces the FDCPA in the bankruptcy context. See Simmons v. Roundup Funding, LLC, 622 F.3d 93, 96 (2d Cir. 2010); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002). Other circuits hold the opposite. See Simon v. FIA Card Ser., N.A., 732 F.3d 259, 271−74 (3d Cir. 2013); Randolph v. IMBS, Inc., 368 F.3d 726, 730−33 (7th Cir. 2004). In any event, we need not address this issue because LVNV argues only that its conduct does not fall under the FDCPA or, alternatively, did not offend the FDCPA's prohibitions. LVNV does not contend that the Bankruptcy Code displaces or "preempts" §§ 1692e and 1692f of the FDCPA.

Because we hold that LVNV's conduct violated the FDCPA's plain language, we vacate the district court's dismissal of Crawford's complaint and remand for further proceedings.

VACATED and **REMANDED**.

Cynthia A. Norton
U.S. Chief Bankruptcy Judge
W.D. of Missouri, at Kansas City
February 3, 2016[1]

CLAIMS MADNESS

Part One: Introduction and Background

The claims allowance process has always been ripe for bad behavior. Beyond **Rule 9011** and the criminal penalties for filing a false claim, what are the ethical considerations in:

- ► Filing claims?
- ► Failing to file claims?
- ► Signing claims?
- ► Objecting to claims?

Does signing a claim make you a witness? And what ethical ramifications are there when a debtor or trustee files claims on behalf of a creditor under **Rule 3004** – are there conflicting duties to the debtor, to the estate and to the creditor on whose behalf the claim is filed? Have any of the ethical considerations changed in light of recent amendments to **Rule 3001** in December 2011 and 2012, respectively, that in subsection **(c)(2)** imposed on claims-filers additional requirements in individual debtor cases and included a mechanism for sanctions, and that in subsection **(c)(3)** removed the requirement of documentation for holders of open-end or revolving credit debt? Should it change if you are in a judicial district that allows claims objections to be granted by default without a hearing?

This section will address recent claims decisions and the potential ethical issues these decisions raise. A note of caution: in light of the two recent amendments to **Rule 3001**, cases preceding the amendments may or may not retain persuasive effect.

Part Two: Dissection of Rule 3001

So, let's start with the precise language in **Rule 3001**, and to fully understand the issue, we start with one of the last subsections of **Rule 3001**, **subsection (f)**. **Rule 3001(f)**, which gives **Rule 3001** its "teeth," provides:

> A proof of claim *executed and filed i*n accordance with these rules shall constitute *prima facie evidence* of the validity and amount of the claim.

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[1] Originally prepared effective April 24, 2015, for a presentation to the NACTT, Salt Lake City, July 2015.

(emphasis added).

Turning back, then, to the rest of **Rule 3001:**

► ***General Rule***: **Rule 3001** is the general rule governing the filing of proofs of claim.

► ***Substantial Compliance Required***: **Rule 3001(a)** requires that a proof of claim conform substantially to the Official Form.

► ***Execution by Creditor/Authorized Agent*****: Rule 3001(b**) requires that when the creditor is filing the claim, the claims shall be executed by the creditor or its authorized agent.

Rule 3001(c), governing the *documentation requirement*s, contains the recent amendments, and has several subparts.

► **Rule 3001(c)** originally required a copy of the writing *when a claim is based on a writing* or an interest in property or, if the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction. The documentation requirement still applies, **EXCEPT** for open-end and revolving credit claims in individual debtor cases, discussed below.

QUERY: ***What is the remedy for a creditor's failure to provide documentation or who only provides insufficient documentation?*** Prior to the amendments (and to some extent after the amendments), courts were generally divided into two camps, the "exclusive view" and the "non-exclusive view." The majority exclusive view is that **§ 502(b)** sets forth the exclusive grounds for disallowance of a claim, and failure to file documentation is not among them. Therefore, an objection to a claim based solely on the claimant's failure to attach documents required by **Rule 3001** is without merit. *E.g., In re Brunson*, 486 B.R. 759, 769-70 (Bankr. N.D. Tex. 2013) (Houser, J.). Under the minority view, the failure to attach sufficient documentation to a claim can result in disallowance if, after an objection, a creditor does not prove its claim by a preponderance of the evidence. *E.g*., *In re Lytell,* 2012 WL 253111 (E.D. La. Jan. 26, 2012); *In re Gulley*, 400 B.R. 529 (Bankr. N. D. Tex. 2009); *In re Armstrong*, 320 B.R. 97 (Bankr. N.D. Tex. 2005).

► Added Effective December 1, 2011: **Rule 3001(c)(2)(A) – (D)** imposes additional requirements in individual debtor cases and includes a mechanism for sanctions. As noted by Judge Houser in *Brunson*, 486 B.R. 759, 769-70 the judicial disagreement between the exclusive and non-exclusive camps should be resolved by the December 1, 2011 amendments adding subsections **(c)(2)(A) – (D),** since a creditor's failure to follow the Rule does not result in automatic disallowance. Rather,

►**Rule 3001(c)(2)(A):** ***Itemization Required*****:** requires the creditor file an itemized statement of any interest, fees, expenses, or other charges incurred before the petition was filed.

►**Rule 3001(c)(2)(B):** ***Cure Amount Required:*** requires a secured creditor to include a statement of the amount necessary to cure any default as of the date of the petition.

►**Rule 3001(c)(2)(C):** ***Home Mortgage Escrow Required*****:** requires the creditor whose interest is in the debtor's principal residence to include an attachment prescribed in the Official Forms and, if there is an escrow account, an escrow account statement in a form consistent with applicable nonbankruptcy law.

►**Rule 3001(c)(2)(D):** ***Remedy*****:** provides that if the claimholder fails to provide any information required by subdivision (c), the court may, after notice and a hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

► Added Effective December 1, 2012**: Rule 3001(c)(3)(A): Documentation Exception for credit-card like creditors and their collection agents/claims buyers:**

When a claim is based on an open-end or revolving consumer credit agreement – except one for which a security interest is claim in the debtor's real property – the creditor shall include a statement with all of the following information that applies to the account:

(i) the **name** of the entity from whom the **creditor purchased** the account;

(ii) the **name** of the entity to whom the debt **was owed** at the time of an account holder's last transaction on the account;

(iii) the **date** of an account holder's **last transaction**;

(iv) the **date** of the **last payment** on the account; and

(v) the **date** on which the account **was charged** to profit and loss.

Rule 3001(c)(3)(B): Ability of Debtor/Trustee to Request the Writing: On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision [the writing on which the claim is based].

Part Three: Legal & Ethical Issues Raised

The amendments raise several legal and ethical issues. Recognizing that **Rule 9011** still applies to claims, in addition to ethical obligations under **MRPC 3.1** (meritorious claims and defenses) and **MRPC 3.2** (expediting litigation) the following questions remain:

► Is the debate between exclusive view/non-exclusive view resolved?

► Is it ever ethical to object to claims based on lack of documentation? Does it make a difference if your district allows claims objections to be sustained by default?

► Is there still a basis to ask for disallowance? Is that ethical?

► What do you do with secured creditors who refuse to file claims?

► Do the itemization requirements in particular make it risky for a trustee to file a claim on a creditor's behalf?

► Is there still some way to deal with abusive claims filing/claims objections practices?

► What are "best practices" for debtors, creditors, and trustees in filing and objecting to claims? What type of evidence will it take for a debtor to defeat the claim of a claims buyer? When should the Amendments be applied retroactively? Under what circumstances should you be entitled to attorney fees?

Part Four: Case Law Summary:

When a secured creditor doesn't file a claim in Chapter 13 or the claim is late:

In re Dumain, 492 B.R. 140 (Bankr. S.D.N.Y. 2013) (Morris, C.J.). Chapter 13 debtor objected to late- filed claim of secured creditor; discussing the three approaches to creditor bar dates; (1) that the omission of secured creditors from **Rule 3002(a)** (necessity of filing a claim) means that secured creditors have no bar date, e.g., *In re Strong*, 203 B.R. 105, 111-12 (Bankr. N.D. Ill. 1996); (2) the secured creditor must comply with a bar date, but not necessarily the bar date provided in **Rule 3002(c)** (i.e., completion of plan payments, or the filing of a trustee's final report, or some other date); and (3) secured creditors must comply with the bar date. The court adopts the third approach in

light of the plain language in **§ 502(b)(9)**; neither the plan nor the schedules created an informal proof of claim.

Compare In re Pajian, 508 B.R. 708 (Bankr. N.D. Ill. 2014) (Cassling, J.) (noting that the policy considerations underlying the *Dumain* court's approach – that it is unfair to permit a secured creditor to file a proof of claim after a plan has been confirmed – are not present in the 7th Circuit; since the 7th Circuit holds that a confirmed plan is a binding contract between the debtor and the creditors, so long as the proof of claim is filed before confirmation, no unfairness occurs; overruling the debtor's objection to the secured portion of the claim but sustaining the objection as to the unsecured portion).

In re Barker, 2014 WL 1273765 (B.A.P. 9th Cir. Mar. 28, 2014) (not designated for publication). Bankruptcy court did not err in disallowing late-filed claims in chapter 13; no informal proof of claim; no judicial admission doctrine.

PRACTICE TIP: Creditors' lawyers may be able to create an informal proof of claim for their clients by including language sufficient to prove the four elements in their entry of appearance. To constitute an informal proof of claim under *Dumain* a document must have been (1) timely filed with the bankruptcy court and part of the judicial record; (2) state the existence and the nature of the debt; (3) state the amount of the claim against the estate; and (4) evidence the creditor's intent to hold the debtor liable with the debt.

PRACTICE TIP: Debtors' lawyers may be able to file a late claim on the secured creditor's behalf under **Rule 3004** and **Rule 9006(b)(1)** on the grounds of excusable neglect (Credit to Judge William Houston Brown).

QUERY: Is there authority to compel a secured creditor to file a claim?

When the secured creditor's claim has been expunged:

In re Jimenez, 492 B.R. 373 (Bankr. S.D.N.Y. 2013) (Morris, C.J.) Secured creditor can't compel the Chapter 13 debtor to surrender or abandon the property, once the creditor obtained stay relief and the debtor had expunged the claim.

When the creditor refuses to attach documentation:

Lack-of-Documentation Claims Objections No Longer Allowed*: In re Brunson*, 486 B.R. 759 (Bankr. N.D. Tex. 2013) (Houser, J.) Amended **Rule 3001** would be applied retroactively to chapter 13 debtors' case filed before the effective date of the amendment; debtors' blanket claims objections to scheduled claims based solely on lack of documentation could not be sustained.

Accord; And, Debtors Can't Avoid the Result by Recharacterizing the Objection as a Standing Argument. *In re Gorman*, 495 B.R. 823 (Bankr. E.D. Tenn. 2013) (Rucker, J.)

The alleged lack of supporting documentation was not a valid basis for objecting to a proof of claim filed by assignee of credit card account, even if debtor's recharacterized the objection as an objection to standing.

The creditor, through a servicer, filed a claim for $365 on Feb. 23, 2011. The basis for the debt was a Mastercharge account ending in 6639. The claim included a statement that provided an account number, the amount of the debt, and the date the debt was charged off. The place for last transaction date was blank. The chapter 13 debtors objected to the claim on the grounds that the documentation as to ownership of the claim was not attached, and that a power of attorney was not attached to establish an appropriate agency relationship for the servicer to file the claim. Debtors had scheduled the claim as disputed. The court finds there is support for most of the debtors' argument, but it is the minority view, *citing In re Richter*, 478 B.R. 30 (Bankr. D. Colo. 2012); the court was bound to follow the majority view of the 6th Circuit, *B-Line, LLC v. Wingerter*, 594 F.3d 931, 941 (6th Cir. 2010).

The debtors argued that the claim lacks validity because it violated **Rule 3001**, because the servicer failed to provide evidence of its authority, and no statement of the loss of that evidence was attached. But failure to attach a power of attorney is not a violation of **Rule 3001(b); Rule 9010 s**tates that evidence of a power of attorney is not required for the execution and filing of a claim; claim was thus in substantial conformity. Plus, the Official Form 10 was changed in 2012 to delete the direction that an authorized agent must attach a power of attorney if one existed. However, claim did not comply with the version of **Rule 3001(c)(1**) in effect at the time the claim was filed since no documentation attached; not fair to apply new **Rule 3001(c)(3)** retroactively, even though the objection was filed after the effect of the subsection **(c)(3).**

Standing: An allegation of lack of documentation is not a valid objection even if the debtors re-characterize it as an objection to standing. A valid objection to standing must raise a factual dispute about who is the holder of the claim. The debtors must allege that, to the best of their knowledge, information, and belief, either (a) they owe someone else or (b) they do not owe the obligation at all. In addition, the court does not find support for holding otherwise based on debtor's desire to impose a heavier burden on creditors in order to lighten the debtors' burden to review the proofs of claims which have been filed, especially when the burden is imposed by the Bankruptcy Code and Rules.

And, Debtors Can't Avoid This Result By Scheduling Debts as Disputed: *In re Rehman,* 479 B.R. 238 (Bankr. D. Mass. 2012) (Hoffman, J.). Pre-amendment to **Rule 3001(c)(3)**, alleged deficiencies in supporting documentation attached to proofs of claim for credit card debt filed by creditors that had attached account summaries and the like did not constitute ground for disallowance of proofs of claim; debtor was estopped, when

she listed unsecured debts in precise amounts and with the same account numbers as the credit card debts but listed as "disputed," when she did not contest she owed the debts.

Alleged Abuse of Claims Process Can't Be Raised as Claim Objection; Need an Adversary. *In re Stow*, 2013 WL 3199825 (Bankr. E.D. Tenn. June 24, 2013) (Rucker, J.). Debtor objected to claims to which no documentation was attached, and argued that creditor's intentional decision not to comply with **Rule 3001(c)** or oppose the objections was an abuse of the bankruptcy system. The court found that the remedy is generally loss of the evidentiary presumption contained in **Rule 3001(f),** unless the creditor fails to respond or does not oppose disallowance. Debtor did not file a **Rule 11** motion. If the debtor seeks further relief, such as an injunction or a claim for damages for abuse of process, an adversary proceeding must be filed. **Rule 7001(1), (7).**

But If You Are Going to File an Adversary, Don't Delay: Adversary Complaint Alleging Abuse of Claims Process Not Untimely Per Se, But Debtors Didn't Show Cause to Relitigate or Impose Sanctions, Particularly Given Their Delay. *In re Ruth*, 473 B.R. 152 (Bankr. S.D. Tex. 2012) (Bohm, J.) Months after the court entered an order allowing all claims based on the Chapter 13 Trustee's notice, the debtors filed a complaint against unsecured creditor (LVNV Funding) seeking disallowance (reconsideration) of the claim, actual and punitive damages for vexatious litigation and sanctions against the creditor based on the conduct of allegedly willfully and intentionally filing thousands of proofs of claim without sufficient supporting documentation. The court rejected the creditor's argument that the complaint was untimely; **§ 502(j),** governing reconsideration of claims, imposes no time constraints. However, **§ 502(j)** should not be used as a means to rehash already litigated issues; if already litigated, claims reconsideration should be limited to a one year limitation under **Rule 60(b)** standards as incorporated by **Rule 9024**. Here, the allowance of the claim was not litigated, so court could exercise its "virtually plenary" discretion and the equities of the case to determine whether the claim should be reconsidered.

The court agreed that the documents attached to the claim were insufficient to conclusively establish that the creditor was the present holder of the debt, but debtors put on no evidence rebutting the presumption of validity of the claim. In addition, the proffered reason of debtor's counsel for waiting to object – that he didn't think it was economically prudent to object but then changed his mind – was not a sufficient reason. "For the Chapter 13 system to operate efficiently and effectively, the Chapter 13 trustee, and all creditors who have filed claims, need to know relatively soon what the universe of allowed claims will be so that the trustee can make the proper distribution to creditors once the plan is confirmed." The court agrees that filing a claim with amount for "unsecured chargeoff" and last 4 digits of account number is insufficient and in bad faith, but declines to award sanctions under inherent power given the debtors' delay in

objecting, and debtors have no standing to object to claims filed in cases other than their own. Debtors' claim for vexatious litigation similarly fails.

"Creditors should not be permitted to deliberately file woefully deficient proofs of claim in the hope that the debtor will not object to their violations of **Rule 3001** … [but] it is still incumbent on all debtors (including the Plaintiffs here) to timely file objections to proofs of claim pursuant to the Local Rules and notices sent by the trustee…"

And, Adversaries Likely Don't Work Anyway: *In re Poteet*, 2011 WL 3626696 (Bankr. E.D. Tenn. Aug. 17, 2011) (Cook, J.) Chapter 13 debtors filed an adversary complaint against eCast, alleging that the five proofs of claim it filed were not supported by documentation and, based on this allegation, seeking damages for alleged violations of the automatic stay, **Rule 3001(c)** and the **FDCPA**. The bankruptcy court granted the defendant's motion to dismiss for failure to state a claim. "If the proof of claim is inaccurate or incomplete, the debtor's remedy is to object to the claim…" In addition, **Rule 3001** does not provide a remedy for failure to comply, and there is no basis for creating a private right of action under the rule; violation of the rule does not result in sanctions. *B-Line, LLC v. Wingerter (In re Wingerter)*, 594 F.3d 931, 941 (6th Cir. 2010). Also, the filing of a proof of claim in a bankruptcy case is not a violation of the **FDCPA**.

Accord*; In re Turner*, 2011 WL 4352158 (Bankr. E.D. Tenn. Sept. 16, 2011) (Rucker, J.) In granting creditor's motion to dismiss a *Poteet*-type complaint for failure to state a claim, the court notes that even inaccurate claims filed do not violate the stay; even for failure to provide insufficient documentation, the result is not a cause of action against the creditor, but, rather, the loss of the creditor's prima facie validity for its proof of claim; debtor's claim fails to state fraud with particularity under **Rule 9(b)**; debtor's request for sanctions denied for failure to comply with the **Rule 11** 21-day safe harbor requirement.

> ►***Compare: Times Have Changed****: In re Garvida*, 347 B.R. 697 (B.A.P. 9th Cir. 2006) (sustaining objection to arrearage amounts in proof of claim where creditor failed after numerous requests to produce itemization).

Compare: When the Chapter 13 Trustee Files the Claims: *In re Richter*, 478 B.R. 30 (Bankr. D. Colo. 2012) (Romero, J.). Chapter 13 debtors in 100% plan objected to claims filed by two credit card creditors who had failed to attach documentation and evidence of any assignment, and on the grounds of standing to file claims. Debtors had scheduled one creditor, and not the other. One creditor later amended its claim and attached documentation. The creditors did not respond to the objection, but the Chapter 13 Trustee responded, arguing that the objections to claims based on lack of documentation should not be upheld, under *In re Reynolds*, 470 B.R. 138 (Bankr. D. Colo. 2012), and that the remedy for a **Rule 3001(c)(2)(D**) violation was not disallowance. The debtors

responded that the Chapter 13 Trustee lacked standing to respond on the creditors' behalf. The Trustee proposed to show cause the creditors to compel them to intervene, but rather than file such a motion, the Trustee filed a supplemental motion, arguing that **Rule 3001** doesn't require proof of an assignment, and that an evidentiary hearing should be set to allow the creditors a last opportunity to defend. The debtors moved to strike the response.

The court held that the Trustee has standing, particularly in a 100% payment plan case; that the first creditor was allowed to amend after the bar date and the amended claim be deemed timely since the substantive content was the same; debtors' objection to the amended claim was therefore moot. With respect to the assigned creditor who had attached no documentation, the court noted the three approaches for whether documentation of an assignment needs to be attached to the claim; assignment not required in reliance on **Rule 3001(e)(1);** assignment required; and the middle-approach (requiring evidence of ownership). The court believes some documentation evidencing assignment is required. This creditor could not rely on the presumption of validity.

The court expressed its concern at several points in the opinion regarding the Trustee's actions in responding when the original creditors had not, but held that an objection to standing is a substantive objection that debtors could proceed with, and that since one of the claims was not entitled to the presumption of validity, the trustee had put himself in the awkward position of having to defend the creditor's proof of claim and that the trustee bore the burden of establishing that the creditor held an enforceable claim. The motion to strike the trustee's response was denied.

Compare: When the Debtors Offer Testimony*: In re Pursley*, 451 B.R. 213 (Bankr. M.D. Ga. 2011) (Laney, C.J.) (objections to eCAST claims; debtors overcame presumption of validity by offering testimony that they didn't know anything about eCAST, and had not owed eCAST any money; in addition, eCAST's attorneys refused to provide information).

When the creditors' documentation is insufficient:

Substantial Compliance OK; Discussing Standard of Testimony/Evidence Required, & Limited Disagreement with Pursley*: In re Crutchfield*, 492 B.R. 60 (Bankr. M.D. Fla. 2013) (Walker, J.). Applying amended **Rule 3001(c)(3)** with respect to open-end credit agreements to Chapter 13 case filed before the effective date, and overruling the debtor's objection to 7 unsecured claims on the grounds of insufficient documentation; although none of the proofs of claim provide 100% of the information required under **Rule 3001(c)(3)**, the missing information does not affect the ability of the debtor to match the claim to a known and acknowledged debt; in each case, the account summary provided additional information not expressly required by the Rule that can be useful in identifying a corresponding debt; finding substantial compliance.

The court disagrees with *Pursley* in two respects; the court is unpersuaded that a debtor's testimony that he never made any agreement with the entity who filed the claim; he never received any notice of assignment of the claim; never received any correspondence from the assignee; never heard of the assignee; and has no knowledge he owes money to assignee would be sufficient to rebut the evidentiary presumption; second, *Pursley* focused on whether the creditor could prove its assignment under state law by establishing that it was the proper party in interest to enforce the claim; enforceability of a claim under **§ 502(b)(1)** refers to the nature of the claim, not the sufficiency of the proof.

Accord; Debtors Will Need to Present Evidence*: In re Goeller*, 2013 WL 3064594 (Bankr. E.D. Va. June 19, 2013) (Mayer, J.) Objections to claims on grounds of insufficient documentation had to be set for evidentiary hearing, and in one case, re-served; discussing the requirements of the various subsections of **Rule 3001** and the remedies:

"The underlying principal governing these objections is that the bankruptcy claims process should be simple and straight-forward so that creditors can be promptly paid. This objective is furthered if creditors are able to file claims without undue expense or burden. At the same time, there must be standards so that trustees, debtors and other creditors can reasonably determine whether filed claims are proper. **Rule 3001** endeavors to balance these competing principles. Mere non-compliance with the informational requirements of **Rule 3001** such as attachment of documentation or providing specific information should not be, in and of itself, grounds to disallow the claim. If the proof of claim can reasonably be analyzed, it should not be summarily disallowed because it does not fully comply with the informational requirements of **Rule 3001**, but the creditor may be sanctioned for the non-compliance. Substantive objections on the merits of a claim, such as an incorrect calculation of the claim, that the claim is not owed or that payments have not been credited, are favored over objections to technical or procedural defects. In this case, there is a mix of both types. It is necessary to determine who the creditors are and the amounts of their claims. Objections intended to resolve these issues are entirely proper. Objections intended to eliminate claims so that a chapter 13 plan will "work" do not further the objectives of the bankruptcy claims process. Courts have some discretion with respect to default judgments. In this instance, the matters must be set for a hearing and the debtors must present evidence to support their objections."

Accord; Debtors Failed to Present Evidence: *In re Umstead*, 490 B.R. 186 (Bankr. E.D. Pa. April 3, 2013) (Frank, C.J.). Chapter 13 debtor's objection to proofs of claims allegedly owing on debtor's credit card account, disputing whether the claimants were the owners of the accounts, overruled. Claims were substantially in compliance; failure of proof of claim to specify the "last payment" and the "last transaction" did not deprive

claim of prima facie evidentiary status, particularly given debtor's failure to introduce *any* evidence disputing the validity or the amount of the claim.

Accord; No Evidence, But What About State Law? State Law Requirements May Not Be Relevant: *Matter of Berardi*, 2013 WL 6096227 (Bankr. D.N.J. Nov. 20, 2013) (Wizmur, J.) The Chapter 13 debtors seek here to expunge a proof of claim filed on behalf of an alleged assignee of credit card debt owed by one of the debtors. The debtors contend that the claim is unenforceable under state law because there is no evidence of a clear assignment attached to the proof of claim and no proof that notice was given to the debtors of the purported assignment. Because the proof of claim meets all filing requirements and is entitled to a presumption of validity, and because the debtors have failed to produce any evidence to rebut the presumption, the debtors' motion to expunge is denied.

"Although the last payment date is obviously in error, I can readily determine that enough information has been provided to substantially comply with the rule and afford enough information to allow the debtors to identify the debt. (cite omitted). In this case, the names of the card issuer, Applied Bank and Applied Card Systems, are similar enough to put the debtor on notice, and the amount scheduled by the debtors, $1,508, and the amount in the proof of claim, $1,508.13, are practically identical. The debtors' further challenge to the validity of the assignment under state law, based on their contention that New Jersey law requires notice to be given to a debtor of any assignment before a valid assignment of that interest can exist, must also fail on the same ground. Even if the debtors are correct that notice of the assignment to the debtors is required, a proposition I disagreed with in *Lafferty, [*2012 WL 6645729, Bkrtcy.D.N.J., December 19, 2012], the debtors have produced no facts to establish that the debtors failed to receive such notice. In the absence of any evidence to negate the prima facie validity of the filed claim, the objection must fail."

Accord; State Law Did Not Render Claim Unenforceable. *In re Nussman*, 501 B.R. 297 (Bankr. E.D.N.C. 2013) (Humrickhouse, J.). Rejecting debtor's argument that the creditor was a claims buyer under applicable North Carolina law, and thus was required to attach additional documentation; the state law requirements were pleading requirements for state law collection suits; filing a proof of claim does not constitute a collection effort and failure to comply with the state law did not render the claim unenforceable.

Accord; And Possible Bad Faith of Chapter 13 Debtors. *In re Hill*, 2014 WL 80157 (Bankr. E.D. Ky. Feb. 28, 2014) (Wise, J.). Debtors' blanket objections to credit card claims filed by third party collectors or servicers were overruled; the claims substantially complied with **Rule 3001(c)(3);** the claims were not scheduled as disputed. "Finally, if the Debtor had a sincere question regarding the documentation underlying the claims, she

could have made the written request to the creditor as provided in sub-part (B) of **Rule 3001(c)(3)**. Instead of complying with the procedural rules, the Debtor has pursued litigation." Chapter 13 Trustee's objection that plan was not proposed in good faith was not addressed, since debtors had to amend plan anyway. "The amendment matters. The requirements of amended **Rule 3001(c)(3)(A)** *replaced* the requirement of attaching the original contract *unless* the documents are requested from the claimant pursuant to **Rule 3001(c)(3)(B)**."

"The claims process is intended to be a simple, manageable process—not one full of pitfalls that prevent legitimate claims from being paid. The harder courts make it for legitimate creditors to get paid, the farther they get from the goals of bankruptcy and the pursuit of justice." (cites omitted). The Debtor's objections appear to be attempts to prevent legitimate claims from being paid, and to create costs and time consuming difficulties for creditors in having to prove their claims in ways not required by the Bankruptcy Rules. The Debtor has made no allegation that the debts are owed to someone else, or that the debts are not owed at all. In short, the claimants' documentation is sufficient and the Debtor's standing arguments are without merit."

And don't forget, Rule 11 is still alive and well:

Rule 11 Against Creditor's Attorney*: In re Obasi*, 2011 WL 6336153 (Bankr. S.D.N.Y. Dec. 19, 2011) (Lane, J.) (creditor's attorney's practice of filing proofs of claim without review of the signing attorney constituted a clear violation of **Rule 9011**; however, court denies the U.S. Trustee's request for civil contempt and sanctions for failure of service under the safe harbor rules; rejecting an argument of the creditor's attorney that the duty of reasonable inquiry was satisfied by the law firm's procedures; that argument ignores the personal nature of an attorney's obligations under **Rule 9011**. The attorney in question did not review the document and had no intention of doing so prior to filing. Instead, he authorized – in advance – an associate under his supervision to sign his name to whatever document that associate produced. While he set out a checklist for the associate to follow, he had no way of ensuring that his associate would comply with that checklist or that the resulting written product would otherwise comply with **Rule 9011**. "A signer may not drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation … at a minimum, the reasonable inquiry standard requires at least some affirmative investigation on the part of the signer."

Rule 11 Against Debtor's Attorneys in Objecting*: In re McFarland*, 462 B.R. 857 (Bankr. S.D. Fla. 2011) (Olson, J.) (order to show cause entered why sanctions should not be imposed on attorneys who filed objections to proofs of claim based on lack of supporting documentation, when debtors had scheduled claims, as undisputed, in amounts that equaled or exceeded amounts set forth in the proofs of claim. Debtor's

counsel violate ethical rules by objecting to a claim for lack of documentation when the debt is scheduled in substantially the same or greater amount, by disputing liability or amount with no substantial basis, or seeking to strike a claim in its entirety when any portion of the debt is undisputedly due and owing; imposing sanctions, including suspensions from practice).

But Can I Still Object If I Schedule As Disputed? *In re Armstrong*, 487 B.R. 764 (E.D. Tex. 2012) (Clark, D.J., affirming Rhoades, B.J.) Debtor's counsel violated **Rule 9011** when he filed purely procedural objections, based on lack of supporting documentation, to each and every claim filed by credit card issuer; affirming bankruptcy court's imposition of $500 monetary sanction, finding that the debtor's attorney "participated in, or facilitated a scheme to improperly manipulate the bankruptcy process." Attorney filed Chapter 13 for affluent debtor, representing that all creditors would be paid; plan confirmed on that basis; debtor's counsel contended he was simply fulfilling his duties to this client. "That tired excuse for abuse of opposing parties and the advancement of baseless claims has been thoroughly discredited." 487 B.R. at 773. Such conduct violated **Rule 3.01** (meritorious claims) and **3.02** (minimizing the burdens and delays of litigation). "It is not uncommon to see dozens of attorneys in a bankruptcy courtroom, presenting arguments and objections on a long list of cases, with rulings issued at a pace that makes a cattle auction appear leisurely. A bankruptcy court does not have the time district courts devote to a motion, to examine each petition, proof of claim and objection; the bankruptcy judge must rely on counsel to act in good faith. The potential for mischief to be caused by an attorney who is willing to skirt ethical obligations and procedural rules is enormous. There is no question that strong deterrence must be a consideration when a bankruptcy judge considers sanctions."

See also In re Velez, 465 B.R. 912 (Bankr. S.D. Fla. 2012) (Olson, J.) (debtor's attorney violated **Rule 9011** by objecting to claims that debtors had scheduled for a substantially similar amount; attorney suspended from practice for 31 days. "The gig is up … on debtors taking advantage of the cost of responding to claims objections and obtaining orders striking claims which the debtor has acknowledged owing in whole or substantial part…" (cite omitted). Also, scheduling claims as disputed doesn't shift the burden back to the creditor).

But, Fact That Claim Ultimately Denied Does Not Mean Claim Was Frivolous: *In re Torres*, 2013 WL 1248640 (C.D. Cal. Mar. 27, 2013) (creditor filed claim against the chapter 11 debtor; the bankruptcy court lifted the stay to allow the claim and debtor's counterclaim to be liquidated in state court; the debtor prevailed, so creditor's claim was denied, and debtor requested sanctions against the creditor under the bankruptcy court's inherent power to sanction; the bankruptcy court refused to grant any sanction, and the debtor appealed. On appeal, the district court held that the bankruptcy court did not abuse its discretion in refusing to grant sanctions in favor of debtor and against a creditor whose

claim was ultimately denied; simply because a claim is ultimately deemed meritless or without evidentiary support does not necessarily indicate that such a claim was brought in bad faith; a finding of bad faith is necessary to impose sanctions under the court's inherent power to sanction).

How does all this effect fee-shifting?

Even Though Claim Not Compliant, Not Scheduled, and Debtors' Requested Information and Creditor Refused to Respond, & Debtors Weren't Requesting Disallowance, Debtor's Attorney Fees Disallowed*. In re Dunlap*, 2013 WL 5497047 (Bankr. D. Colo. Oct. 3, 2013) (Tallman, C.J.). Chapter 13 debtors objected to a collector's claim of $508.95 for insufficient compliance with **Rule 3001(c)(3)**; debtors had not scheduled the creditor, and the objection was properly served and creditor did not respond. Court found that the claim did not comply with Rule 3001(c)(3). However, above-median debtors were in a five-year confirmed plan paying a $69.96 dividend, or less than 1/10th of one percent to the more than $80,000.00 of unsecured claims.

"The instant claim Objection is but one of seven objections that the Debtors have filed in this case. The Court searches in vain for a glimmer of economic rationality underpinning the Debtors' objections. The total value of claims that the Debtors have objected to is less than $3,000.00. Successful resolution of all objections in the Debtors' favor would result in less than $3.00 to be divided up among the remaining claimants. The disallowance of Claim # 12, the subject of this particular Objection, would increase the dividend to be divided among the remaining unsecured creditors by less than $ .50. This Objection is all the more remarkable for the Debtors' failure to advance any substantive objection to the Creditor's claim. Debtors wholly ignore the applicable Bankruptcy Code section, **11 U.S.C. § 502(b),** as authority to disallow the claim. Instead, the Debtors rely exclusively on a procedural rule, **[Rule] 3001** as authority for disallowance. The Court has previously held that revisions to **Rule 3001**, effective December 1, 2011, have limited a bankruptcy court's latitude in granting relief based on a creditor's failure to comply with the documentation requirements in **Rule 3001(c)** and that **Rule 3001(c)(2)(D)** does not permit the Court to disallow a proof of claim based solely on a creditor's failure to comply with **Rule 3001(c)**. (cite omitted). Given that the Debtors' Objection fails to raise any substantive objection to the allowance of the Creditor's claim, the Objection must be denied."

With respect to the debtors' request to prohibit the creditor from presenting the omitted information as evidence in the future and request for attorney fees under **Rule 3001(c)(2)(D)(ii),** the court agrees that the attorney fees were "caused" by the creditor's failure to document the claim; however, the reasonableness element was lacking. "The Court's review of the Debtors' plan and the claims filed in this case reveals a total benefit to the remaining creditors in the estate, resulting from disallowance of Claim # 12, to be

less than $ .50. Where the greatest potential benefit of the attorney's labors is less than $ .50, the Court finds that any attorney fees incurred in such an enterprise are unreasonable as a matter of law."

But See; What is Good for the Goose Is Good for the Gander; Creditor's Attorney Fees Denied. *In re Wirth*, 503 B.R. 800, 803-04 (Bankr. W.D. Wis. 2013) (Martin, J.). Creditor could not claim attorney fees incurred in defending the Chapter 13 debtor's objection to its proof of claim, where the attorney fees were caused by the creditor's own lack of diligence in not sufficiently itemizing its attorney fees in the proof of claim to begin with. "The court has the responsibility for avoiding waste of estate assets and preventing overreaching by attorneys in their attempts to be paid attorney's fees from the estate." (cite omitted).

Rule 3002.1 Fee Shifting: *In re Harris*, 492 B.R. 225 (Bankr. S.D. Tex. 2013) (Isgur, J.)

Rule 3002.1 Fee Shifting: *In re Lopez*, 2012 WL 6760175 (Bankr. S.D. Tex. Dec. 31, 2012) (Paul, J.) (no sanctions awarded under **Rule 3002.1** when the secured creditor's claim predated the effective date of the Rule, and complied with the Official Form in effect at the time the claim was filed).

But what to do we do with abusive practices?

When the Creditor Files a Claim That Was Discharged in a Previous Case. *In re Guenot,* 2014 WL 67320 (Bankr. D.N.J. Jan. 2, 2014) (Ferguson, J.) Creditor filed a claim in a Chapter 13 case based on debt that had been discharged in the debtor's previous Chapter 7. The proof of claim was later withdrawn, and the creditor received no payment under the plan. Debtor's attorney filed an adversary complaint against the creditor and its attorneys, alleging that filing the proof of claim violated the discharge injunction of **§ 524,** the **FDCPA**, and various state consumer protection laws. The bankruptcy court found subject matter jurisdiction based on "related to" jurisdiction, given that, in the Chapter 13, any recovery would inure to the benefit of creditors and thus had an impact on the administration of the estate. However, state and federal consumer protection laws are pre-empted by the bankruptcy code in the claims objection context where the laws conflict; the requirement that a debtor have actual damages under the Bankruptcy Code and Rules conflicts with consumer laws that only require ascertainable damages. Here, the damages are self-created, since the only damages are attorney fees for prosecuting the adversary. The debtor failed to produce any evidence to support the allegation that she was upset, such as a certification from a medical professional. "Being 'upset' does not warrant compensation under **§ 362(k).** The Debtor's emotional distress, to the extent it existed, also suffers from the same self-created problem as the attorney's fees. Unlike a demand letter or a phone call directly to a debtor from a creditor or collection agency, a debtor has no reason to be aware of the

filing of a proof of claim. If Ms. Guenot was aware that [the creditor] had filed a proof of claim it could only be because her attorney told her about it in order to file this complaint. Had her attorney chosen to call [the creditor's] counsel and ask them to withdraw the claim, then perhaps the Debtor's emotional distress could have been avoided." Summary judgment granted in favor of the creditor.

Additional Punishment to Offending Creditor Not Necessary*: *In re Gilliland, 474 B.R. 482 (Bankr. N.D. Miss. 2012) (Houston, J.) Chapter 13 debtor filed adversary complaint against creditor Capital One and its collection agency which filed a claim that had been discharged in his prior Chapter 7, seeking damages for violating the discharge injunction, filing a false proof of claim, violation of **Rule 3001**, and violation of the **FDCPA**, and requesting that the bankruptcy court certify a class action and seeking injunctive relief. The creditor withdrew the claim, and argued that there were discrepancies in the debtor's name and address from the Chapter 7 that caused it not to recognize that this was a discharged debt. The court denied class certification, noting that the debtor's circumstances were different from other putative class members, in that the debt related to a business in another town with a different address. The court also noted that Capital One had already agreed to certain claims processing procedures in a Massachusetts adversary case, and that to add additional measures here would be "piling on."

Filing Time Barred Claim Not an FDCPA Violation: *In re Claudio*, 463 B.R. 190 (Bankr. D. Mass. 2012) (Boroff, J.) (filing of a proof of claim on account of a debt that is barred by the statute of limitations in a Chapter 13 case did not constitute a violation of the **FDCPA**; adversary complaint dismissed. Also, sanctions denied for debtor's failure to comply with the safe harbor provisions of **Rule 9011**).

Intentional Filing of Unsecured Claim Which Is In Fact Fully Secured May Violate Rule 11: *In re Burnette*, No. 11-71622, at 2 (Bankr. W.D. Va. Nov. 18, 2011) (in disallowing the claim as an obstacle to the debtor's ability to confirm a bankruptcy plan under which his creditors could be paid in full, the bankruptcy judge noted that "the intentional filing of an unsecured claim by the creditor which in fact has a fully secured claim and is being so treated in the Plan may violate the provisions of [**Rule] 9011(b)(1), (2),** and **(4)** and subject the creditor to possible sanctions"). *See also White v. FIA Card Services,* 494 B.R. 227 (W.D. Va. 2012) (error for bankruptcy court to refuse to void judgment lien of creditor when the creditor filed an unsecured claim in debtor's chapter 13 case).

Practice of Filing Claims as Secured When They are Not: Fees Awarded Under Inherent Power: *In re Campbell*, 2013 WL 2443377 (Bankr. E.D.N.C. June 5, 2013) (Humrickhouse, J.) The City filed a claim for water services against the Chapter 13 debtor as a secured claim. In fact, since debtor was a renter, the claim was unsecured. The debtor's lawyer emailed the City's counsel, noting that he had previously filed many

objections to what he described as frivolous city claims for small amounts, and stating he would seek **Rule 11** sanctions if the claim was not amended. The City did not amend the claim, and debtor's counsel filed an objection to the claim and a motion for sanctions under **Rule 9011**. The court denied sanctions under **Rule 11** for the procedural defect of not giving the City 21 days' notice of the unfiled motion; formal adherence to **Rule 11** procedures is required and an informal email did not suffice. The Advisory Committee notes state that "[i]n most cases, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a **Rule 11** motion." Thus, while Counsel's email was exactly the right first step, it does not satisfy the official notice requirements of **Rule 9011**." However, the Court would impose attorney fees under **§ 105(a)**; the court was persuaded that the City's erroneous classification of claims was not the result of isolated or clerical error; and, rather, impeded the fair and efficient functioning of the court. The court awarded a total of $3,449.10 in fees and expenses to debtor's counsel for bringing the issue to the court's attention.

Moye v. Cage, 2011 WL 3444221 (S.D. Tex. Aug. 8, 2011) (not designated for publication) (dismissing appeal by creditor who had filed secured claim based on unperfected security interest and whom bankruptcy court had sanctioned in the amount of $23,255 in favor of the Chapter 7 trustee who had had to object to the claim; appeal was interlocutory)

Other Claims/Claims Filing/Claims Objection Issues

Discharge by Claim Objection? *In re Hann*, 711 F.3d 235 (1st Cir. 2013)

Objection When Creditor Files Claim After Issuing a 1099-C filed: *In re Reed*, 492 B.R. 261 (Bankr. E.D. Tenn. 2013) (Stair, J.) (minority view)

Chapter 7 Trustee Shouldn't File Claims On Creditors' Behalf: *In re Vancleef*, 479 B.R. 809 (Bankr. N.D. Ind. 2012) (Klingeberger, J.). In a 2007 chapter 7 case, later reopened to administer a personal injury claim, the court found it was not appropriate for the Chapter 7 Trustee to file claims on behalf of the Schedule F creditors who did not file claims in response to the bar date; noting the two approaches by court in interpreting **§ 501(c)** – the "hose the debtor" approach and the "put out the fire" approach; the court concluded that the purpose of **§ 501(c)** was to protect the debtor or to facilitate reorganizations; the Chapter 7 Trustee could not comply with the requirements of **Rule 3001** and would have had a duty to object to her own claims, since the Chapter 7 trustee also has a duty to a debtor to impartially and fairly administer his case and for the benefit of those who actively participate in it. Noting, without so holding, that a Chapter 13 trustee might have a duty to file a claim on a mortgage creditor's behalf under **§ 1302(b)(4)** so that a debtor's case "can be effectively implemented." Posit a situation in

which a Chapter 7 trustee had knowledge that a creditor had a valid cause of action for an exception to discharge; could that trustee, commensurate with her duties to creditors and to the debtor under **§ 704** actively engage with the creditor to make certain that the complaint was timely filed? This court says no – that would be improper and a derogation of the trustee's duties.

Can we solve the mortgage crisis through the claims objection process?

Wells Fargo Bank v. Oparaji (In the Matter of Oparaji), 698 F.3d 231 (5th Cir. 2012) (mortgage creditor not judicially estopped from claiming, in debtor's second chapter 13 filing, postpetition mortgage arrears and costs not claimed in debtor's previous chapter 13 filing. The debtor has the ability and responsibility to keep track of his outstanding debt; there is no statute or judicial precedent imposing a legal responsibility on the secured creditor to seek the full amount to which it is entitled in each amended secured claim; reversing bankruptcy court decision affirmed by the district court imposing sanctions).

In re Ramos, 493 B.R. 355 (Bankr. D.P.R. 2013) (Flores, J.) (creditor did not hold a valid secured claim against chapter 13 debtors' real estate under Puerto Rico law because the mortgage deed was invalidly recorded after the filing of the petition. The subsequently filed unsecured claim was untimely filed, so was denied. Creditor did not, however, violate the stay for filing an alleged secured claim and sanctions are not warranted for filing an allegedly false claim, given the uncertainty in the new Puerto Rico law).

In re Kreitzer, 489 B.R. 698 (Bankr. S.D. Ohio 2013) (Humphrey, J.) (allegations that holder of the secured claim filed a false claim and should be sanctioned were barred by res judicata and collateral estoppel; state court in the foreclosure action had determined that the creditor held the note and mortgage; subsequent assignment of a properly recorded mortgage did not render it perfected and subject to avoidance).

In re Moehring, 485 B.R. 571 (Bankr. S.D. Ohio 2013) (Humphrey, J.) (chapter 13 debtor's objection to transferred mortgage claim on the grounds it was "false"; that the claim was fraudulently assigned; and that the accrued interest was improperly calculated were overruled. Debtor did not have standing to object to the notice of transfer; only the transferor has standing. Although original claim was filed by a creditor who didn't own the claim, such that the later filing by the transferee of an amended claim did not related back and thus was not timely, the creditor proved it was the holder and that its interest calculations were correct. Since the confirmed plan provided for payment of the creditor, the Chapter 13 Trustee could pay the creditor (recognizing the split of authority).

In re Rinaldi, 2013 WL 655514 (Bankr. E.D. Wis. Feb. 22, 2013) (Kelley, J.) (denying debtors' complaint and objection to claim of mortgage lender; allegations of civil RICO, abuse of process, etc., without merit).

In re Verity, 2012 WL 3561669 (Bankr. D.N.J. Aug. 16, 2012) (Steckroth, J.) (debtors filed a Chapter 13 to stay an ongoing foreclosure action against their home. After the lenders and a servicer filed secured claims, the Chapter 13 debtors filed adversary, objecting to the claims, and seeking sanctions for filing an improper claim, damages under the **FDCPA**, and breach of contract. Debtors asserted that "they did not owe any money to the creditor or have any relationship with the creditor." The court granted summary judgment in favor of the lender; debtors were barred by *Rooker-Feldman* or the court should abstain under *Young v. Harris*; plus, debtors failed to establish any evidence to support at **FDCPA** violation).

In re Akers, 2012 WL 3133924 (Bankr. D.C. Aug. 1, 2012) (Teel, J.) (after Chapter 13 plan was completed, debtor filed an adversary complaint against her mortgage lender, for alleged misrepresentation of escrow and other loan balances, misapplication of payments, improper penalties and filing of a fraudulent proof of claim that misstated her arrears. The court did not have subject matter jurisdiction over the first 3 counts. With respect to the proof of claim, there is no statute or rule or case law that provides an independent cause of action for damages for an alleged fraudulent proof of claim; although **Rule 9011** applies, debtor had not complied with the safe-harbor provision. To the extent the debtor believes the lender was paid excessive amounts, it is irrelevant, since debtor modified the plan to pay the lender directly).

In re Peed, 2012 WL 1999485 (Bankr. S.D. Ala. June 4, 2012) (Mahoney, J.) (court granted the defendants' motion to dismiss adversary complaint filed by Chapter 13 debtors against their mortgage company and its lawyers; no basis to sue lawyers for tort of wantonness under Alabama law for filing motions or proofs of claim in a bankruptcy case; appropriate remedy is **Rule 9011** sanctions, **§ 105(a),** or contempt. In addition, no violation of the **FDCPA)**.

In re Peterson, 2012 WL 4175008 (Bankr. N.D. Miss. Sept. 19, 2012) (Houston, J.) (chapter 13 debtor's complaint against mobile home financer for alleged misapplication of interest as violation of the stay and seeking actual and punitive damages and injunctive relief denied. The interest that accrued was allowed by contract and was incurred when the plan payments did not begin for several months. Debtors otherwise could not prove that creditor had improperly omitted earned but uncollected prepetition interest in the proof of claim and attempted to recoup it as the payments were applied).

ADDENDUM I – *Crawford* & Its Progeny[2]

Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014) *cert. denied*, no. 14-858, 2015 WL 246891 (Apr. 20, 2015).

Reversing the bankruptcy and district courts, the Eleventh Circuit held that filing a proof of claim on a stale debt amounted to "collection activity" and therefore violated the Fair Debt Collection Practices Act (FDCPA or Act).

The debtor, Stanley Crawford, owed approximately $2,000 to a furniture company. The furniture company charged off and sold the debt to LVNV Funding, a bulk debt buyer. Several years after the three-year statute of limitations had run, Crawford filed for Chapter 13 bankruptcy relief. Subsequently, LVNV filed a proof of claim to collect the debt, and the debtor objected based on the expiration of the statute of limitations period. Crawford argued that LVNV's filing of the proof of claim on a stale debt violated the FDCPA.

The district court reasoned that "filing a proof of claim is not the same thing as attempting to collect a debt[.]" Agreeing with another bankruptcy court, the district court explained that if filing a proof of claim is a "collection activity" under the FDCPA then every proof of claim filing would violate the automatic stay.

On appeal, the Eleventh Circuit explained that the purpose of the FDCPA is to regulate the conduct of debt collectors and eliminate "the use of abusive, deceptive, and unfair [and unconscionable] debt collection practices[.]" Pointing out the ambiguity in Congress' use of the terms "unfair" and "unconscionable," the Court employed a "least-sophisticated consumer" standard to determine whether a debt collector's conduct violated the Act. This standard considers whether "the least sophisticated consumer would have been deceived by the debt collector's conduct."

The Court stated that LVNV filed the stale claim because it knew that the claim would be allowed if the debtor or trustee failed to object. Federal courts have uniformly held that threatening suit or filing suit on a time-barred claim violates the FDCPA. Both inside and outside of the bankruptcy context, "the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt." The Court explained that the "least sophisticated consumer" would be misled into believing that by filing the proof of claim the creditor can legally enforce the debt. Therefore, the Court held that LVNV's filing of a time-barred proof of claim was "unfair," "unconscionable," "deceptive," and "misleading," thus violating the FDCPA.

[2] Prepared by Diane D. Carter, Law Clerk to the Hon. Cynthia A. Norton.

Post-*Crawford* Cases[3]

WITHDRAWAL OF THE REFERENCE DENIED

Slaughter v. LVNV Funding, LLC, No. 2:14-MC-2050-KOB, 2015 WL 627954 (Bankr. N.D. Ala. Feb. 12, 2015).[4]

In *Slaughter*, the court considered *Crawford* in the context of whether to withdraw the reference on the plaintiff-debtor's suit against LVNV for filing a proof of claim on a time-barred debt. The debtor argued that the bankruptcy court had jurisdiction to decide the issue based on *Crawford*. Contrarily, LVNV argued that the claim was non-core and attempted to distinguish its case by asserting that *Crawford* addressed the sufficiency of the pleadings rather than the merits of the case. Also, LVNV argued that the *Crawford* decision "produced disparities between the Bankruptcy Code and the FDCPA" resulting in "complicated interpretive issues[ ] of first impression[.]" Denying the motion, the court concluded that the FDCPA claim was "inextricably related" to the bankruptcy case and withdrawing the reference would increase confusion, waste the parties' resources, and hinder the bankruptcy process. Importantly, the court noted that the Eleventh Circuit skirted the issue of whether the Bankruptcy Code preempts the FDCPA when dealing with creditor misconduct in a bankruptcy case.

WITHDRAWAL OF THE REFERENCE GRANTED

Walker v. LVNV Funding, LLC, No. 5:14-mc-02057-LSC, 2014 WL 7409525, (N.D. Ala. Dec. 31, 2014).[5]

In a decision prior to *Slaughter* by the Alabama district court, the court granted the motion to withdraw when presented with similar facts. Following the majority view, the court explained that "[f]or withdrawal to be warranted, the issue must 'require more than the mere application of well-settled or 'horn-book' non-bankruptcy law; significant interpretation of the non-Code statute must be required.'" Resolving the claim must involve "substantial and material consideration of those non-Code statutes which have more than a de minimis impact on interstate commerce."

With these concepts in mind, the court reasoned that the decision on whether to grant withdrawal turned on whether resolution required "substantial and material consideration" of the FDCPA. LVNV argued, like in *Slaughter*, that *Crawford* was inapplicable because the Eleventh Circuit did not rule on the merits. LVNV also argued that the Bankruptcy Code preempts the FDCPA

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[3] Since *Crawford* in July 2014, approximately 32 cases have cited to the decision - as of March 25, 2015.

[4] *Accord Washington v. LVNV Funding LLC*, No. 7:14-mc-02054-RDP, 2015 WL 1245741 (Bankr. N.D. Ala. Mar. 18, 2015).

[5] This court also granted the motions to withdraw the motion on similar facts in *Drummond v. LVNV Funding, LLC*, 2014 WL 7409541, No. 5:14-mc-02058-LSC (N.D. Ala. Dec. 31, 2014) and *Williams v. LVNV Funding, LLC*, 2014 WL 7409544, No. 7:14-mc-02055-LSC (N.D. Ala. Dec. 31, 2014).

when the creditor misbehaves in bankruptcy. The court disagreed with LVNV on the resolution of the legal issues in *Crawford*. However, the court recognized a split of authority within its circuit on the preemption issue and concluded withdrawal was warranted since the preclusion issue would require substantial and material consideration of the FDCPA.

VIOLATION OF THE FDCPA

Grandidier v. Quantum3 Group, LLC, No. 1:14-CV-00138-RLY-TAB, 2014 WL 6908482, (S.D. Ind. Dec. 8, 2014).[6]

Following Seventh Circuit precedent and *Crawford*, the district court ruled that filing a proof of claim on stale debt amounted to an attempt to collect and thus violated the FDCPA.[7] The court opined that creditors could comply with both the FDCPA and the Bankruptcy Code; therefore, violations of the FDCPA would apply in a bankruptcy.[8] To determine whether the filing of a proof of claim constituted collection activity, the court considered several factors: (1) the presence or absence of a demand for payment; (2) the nature of the parties' relationship; and (3) the purpose and context of the communications.

NO VIOLATION OF THE FDCPA[9]

Robinson v. eCast Settlement Corp., No. 14 CV 8277, 2015 WL 494626 (N.D. Ill. Feb. 3, 2015).[10]

The court explained that a claim is a right to payment according to 11 U.S.C. § 101(5) "and creditors file proofs of claim in order to be included in the debtor's payment plan." The FDCPA prohibits the use of "false, deceptive, or misleading" methods of collecting a debt. This court considered whether filing a proof of claim on a time-barred debt, by itself, violated the Act. The creditor asserted that filing a proof of claim is an indication of the creditor's desire to participate in the claims process, not debt collection. However, the court disagreed and stated that "there is no purpose to filing a proof of claim other than to attempt to recover some money for the creditor[.]" The creditor also argued that because the proof of claim was not directed towards the debtor, the FDCPA did not apply. Again, the court disagreed and explained that the debtor is

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[6] *See also Patrick v. Worldwide Asset Purchasing II, LLC*, No. 1:14-cv-00544-TWP-TAB, 2015 WL 627376 (S.D. Ind. Feb. 13, 2015) and *Patrick v. Quantum3 Group, LLC*, No. 1:14-cv-00545-TWP-TAB, 2015 WL 627216 (S.D. Ind. Feb. 13, 2015) (agreeing with the reasoning in *Grandidier* that the Code does not preclude a cause of action under the FDCPA).

[7] *See also Patrick v. Pyod, LLC*, 39 F.Supp.3d 1032 (S.D. Ind. 2014) (holding the same on similar facts); *McLean v. Greenpoint Credit LLC*, 515 B.R. 841 (M.D. Ala. 2014) (holding that the *Crawford* analysis also applies to violations of a discharge injunction in that filing a proof of claim on discharged debt is actionable if willful).

[8] The court cites to courts that have ruled differently – *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010).

[9] *See also Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767 (8th Cir. 2001) (pre-*Crawford* case holding that no violation of the FDCPA occurred when debt collector attempted collection on an otherwise valid time-barred debt when there was no actual litigation or threat of litigation).

[10] *See also LaGrone v. LVNV Funding, LLC* (*In re LaGrone*), No. 13 B 21423/14 A 00578, 2015 WL 273373 (Bankr. N.D. Ill. Jan. 21, 2015) (holding that filing a proof of claim subject to a limitations defense does not violate the FDCPA as the position of a debtor in bankruptcy differs from a consumer in a collection suit).

ultimately responsible for plan payments, and a proof of claim is a communication to the bankruptcy trustee, which "is akin to a communication to a consumer's attorney, which can be actionable."

The court did not find that a time-barred proof of claim was deceptive, false, or misleading when the information provided in the claim was accurate. Instead, it is a claim "subject to dispute in the bankruptcy case." Although the debtor, debtor's attorney, and the trustee may overlook the fact that the claim is time-barred, the court concluded that such an oversight is not caused by misconduct by the claimant. Since there was no other evidence of a violation except for the untimeliness of the proof of claim, the court dismissed the complaint without prejudice.

ABSTENSION

In re Hanson, No. 3:13-bk-4140-PMG/3:14-ap-317-PMG, 2015 WL 639265 (M.D. Fla. Jan. 27, 2015).[11]

Wells Fargo assigned the debtor's mortgage to HSBC Bank in 2008. In 2013, days before a foreclosure sale, the debtor filed Chapter 13. The debtor objected to HSBC's claim, arguing lack of adequate notice regarding the assignment of the underlying mortgage debt. The court abstained from ruling on the objection, distinguishing the case from *Crawford* and refusing to extend the *Crawford* decision. In doing so, the court explained that *Crawford* dealt with a charged off non-mortgage debt where the statute of limitations had run. The court noted that "[t]he [*Crawford*] decision does not stand for the proposition that an on-going and unresolved state law dispute regarding a real estate mortgage should be resolved in Bankruptcy Court."

MOTION TO DISMISS DENIED

Seak v. Antio, LLC et al (*In re Seak*), No. 3:13-bk-5446-PMG/3:14-ap-330-PMG, 2015 WL 631578 (Bankr. M.D. Fla. Jan. 22, 2015).[12]

The creditor argued no grounds existed for damages for an alleged FDCPA violation because the debtor pled insufficient facts to establish the untimeliness of the claim, and the Code precludes FDCPA claims. The court, however, found sufficient facts pled to make plausible a claim for relief. Relying on the district court case *Davis v. NCO Financial Systems, Inc.*, 2014 WL 4954705 (M.D. Fla. Oct. 2, 2014), the court agreed that "no irreconcilable conflict existed" between the remedies available under the Code and the FDCPA. Notably, the court points out that the *Davis* decision was entered after *Crawford*, which did not limit the debtor's remedies to the Code.

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[11] Defendants subsequently filed a Motion for Reconsideration of the Motion to Dismiss, which the court granted based on manifest error since Defendants acquired the debt post-petition and no showing that the filling of the proof of claim was deceptive or abusive; therefore, debtor's complaint failed to state a cause of action. *In re Hanson*, No. 3:13-bk-4140-PMG/3:14-ap-300-PMG, 2015 WL 1259409 (Bankr. M.D. Fla. Mar. 18, 2015).

[12] *See also Brimmage v. Quantum3 Group, LLC et al* (*In re Brimmage*), 523 B.R. 134 (Bankr. N.D. Ill. 2015) (relying on *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004), which held that one federal statute does not preempt another and ruled that the FDCPA and the Bankruptcy Code overlapped and could be reconciled.); *Feggins v. LVNV Funding, LLC* (*In re Feggins*), No. 13-11319-WRS/14-1049-WRS, 2014 WL 7185376 (Bankr. M.D. Ala. Dec. 16, 2014) (finding lack of good cause to stay the proceedings based solely on the defendant's petition for certiorari on *Crawford*).

Elliott v. Cavalry Investments, LLC, No. 1:14-cv-01066-JMS-TAB, 2015 WL 133745 (S.D. Ind. Jan. 9, 2015).[13]

The bankruptcy court sustained the debtors' objection to proofs of claim filed by the creditor on stale debts. Subsequently, the debtors filed suit in the district court against the creditor for violating the FDCPA. The creditor filed a 12(b)(6) motion to dismiss arguing that filing a proof of claim on a time-barred debt did not violate the FDCPA because filing a proof of claim: (1) is not debt collection; and (2) is not an attempt to collect from a person but rather an estate. Quoting *Crawford*, the court stated: "[s]imilar to the filing of a stale lawsuit, a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt."

Based on this reasoning, the court denied the motion to dismiss, but refused to follow *Crawford* since it was early in the case and there were unexplored distinguishing factors between the cited cases applying similar reasoning as *Crawford*. For example, neither party addressed whether the debtor initiating the legal action by filing bankruptcy would impact the court's analysis; whether filing a proof of claim is the creditor's attempt to enforce the debt or instead represents a debt that has not been extinguished on which the creditor may collect if statute of limitations defense is not raised; or whether the fact that the debtors were represented by counsel (therefore unlikely to be deceived by the proof of claim) is material to whether a violation occurred.

MOTION TO DISMISS GRANTED

Gurganus v. Recovery Systems Management Systems Corp. as agent for Portfolio Investments II, LLC, et al. (*In re Gurganus*), No. 13-70114-BGC-13/14-70054, 2015 WL 65089 (Bankr. N.D. Ala. Jan. 5, 2015).

Relying on *Crawford*, the debtors sought damages for the creditor's alleged violation of the FDCPA more than a year after the filing of the proof of claim. The creditor filed a motion to dismiss for failure to state a claim since the debtors failed to file the complaint within the 1-year period for actions brought under the FDCPA. The creditor argued that the 1-year limitations period began to run the day after the filing of the proof of claim. The debtors further argued that if the statute of limitations period was applicable and expired, then the adversary should be deemed a counterclaim to the creditor's proof of claim such that the statute of limitations would not apply. The debtors supported their argument with the Eleventh Circuit case, *In re Ferris*, 764 F.2d 1475 (11th Cir. 1985), which explained how an adversary proceeding arising from the filing of a proof of claim could be viewed as a "counterclaim."

However, the court distinguished its case from *Ferris*, in that *Ferris* dealt with the recoupment savings clause found in the TILA statute of limitations, which provided for the counterclaim exception. The court noted that the FDCPA does not contain such an exception: "There is no 'savings clause' in a FDCPA situation. Consequently, there is no 'counterclaim' possibility in a FDCPA case like the one . . . in *Ferris*[.]"

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[13] *See In re Mazyck*, 521 B.R. 726 (Bankr. D.S.C. 2014) (sustaining debtor's objection to proof of claim on stale debt and disallowing the claim, but finding the filing of the proof of claim did not violate the automatic stay); *see also In re Alexander*, No. 13-13462, 2014 WL 5449653 (Bankr. E.D. Tenn. Oct. 22, 2014) (noting that "stale claims are creating feasibility problems in more cases and claims are being reviewed with more care.").

SANCTIONS

Matter of Sekema, 523 B.R. 651 (Bankr. N.D. Ind. 2015).

Under Fed. R. Bankr. P. 9011, the court sanctioned debt collectors who filed stale proofs of claim. The court found that the debt collectors failed to uphold their duty to conduct a reasonable investigation into the obvious statute of limitations defense available to the debtor. The sanction was made payable to the court since the debtor did not initiate the motion. The court indicated that the sanction served as a deterrent to buyers of consumer debt filing proofs of claim on unenforceable debts.

ADDENDUM II:[14]

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in Debtor's Principal Residence

Part One: Introduction and Background

Rule 3002.1 became effective on December 1, 2011. The Rule applies only to § 1322(b)(5) claims in Chapter 13 cases where the claim is secured by the debtor's principal residence. This Rule supplements § 1322(b)(5), which allows cure and maintenance payments on a Chapter 13 debtor's mortgage during the plan period, by authorizing the bankruptcy court to resolve issues about the mortgage prior to the closing of the case. The Rule is a procedural device designed to protect the debtor's fresh start. Utilizing the Rule would hopefully "prevent unexpected deficiencies in a mortgage when a case is completed and closed," what is also known as the "ugly surprise." 9 *Collier on Bankruptcy* ¶ 3002.1.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.); *In re Martins*, No. 11-14128-BKC-LMI, 2013 WL 9868648, at *1 (Bankr. S.D. Fla. Nov. 20, 2013) (Isicoff, J.).

Part Two: Dissection of Rule 3002.1

Here is a quick breakdown of the Rule:

1. There is a claim in a Chapter 13 case that is secured by the debtor's principal residence. (Rule 3002.1(a))
2. The claimant must notify the debtor, the debtor's counsel, and the trustee of any postpetition change to the mortgage payment at least 21 days before the new payment is due. (Rule 3002.1(b))
3. A detailed, itemized notice of any recoverable postpetition fees, charges, or expenses associated with the claim must be served on the debtor, the debtor's counsel, and the trustee within 180 days of incurring such fees, expenses, or charges. (Rule 3002.1(c))
4. Notices under subdivisions (b) and (c) must be prepared as prescribed by the appropriate Official Form and must be filed as a supplement to the holder's proof of claim. Such notices do not constitute prima facie evidence of validity. (Rule 3002.1(d))
5. The debtor or trustee has 1 year after service of a subdivision (c) notice to challenge any of the itemized fees, charges, or expenses. (Rule 3002.1(e))
6. 30 days after last plan payment, the trustee must notify the debtor, the debtor's counsel, and the claim holder of completion. The notice must: (1) state that the debtor has cured any default and (2) direct the claim holder to comply with subdivision (g). The debtor may file this notice on the trustee and the claim holder if the trustee fails to do so. (Rule 3002.1(f) "final safeguard")
7. Claim holder must respond to the subdivision (f) notice within 21 days of service and indicate whether the prepetition default is cured and whether the debtor is current on payments required by § 1322(b)(5). Claimant must itemize any amounts not cured or not in compliance with § 1322(b)(5). (Rule 3002.1(g))
8. Within 21 days of the subdivision (g) response, the trustee or the debtor may seek a determination by the court on whether a default exists. (Rule 3002.1(h))

[14] Prepared by Diane D. Carter, Law Clerk

9. Sanctions are available for violations of subdivisions (b), (c), or (g). (Rule 3002.1(i))

QUERY: Who carries the burden of proof in establishing the validity of the Rule 3002.1 notice?

Rule 3002.1 notices do not enjoy a *prima facie* presumption of validity. The holder of the claim carries the burden of establishing the validity of the amounts reflected in the Notice of Payment Change. *In re Taylor*, No. 12-11463-NPO, 2013 WL 1276507, at *6 (Bankr. N.D. Miss. Mar. 27, 2013) (Olack, J.); *In re Grandberry*, No. 109-07056/112-90611, 2013 WL 6979402, at *5 (Bankr. M.D. Tenn. Dec. 16, 2013) (Harrison, J.) (creditor did not violate Rule 3002.1 by using its pre-merger name on the notice).

QUERY: Does filing a Rule 3002.1 notice violate the automatic stay?

In *In re Cerrato*, 504 B.R. 23 (Bankr. E.D.N.Y. 2014) (Craig, C.J.), the debtor accused a creditor of violating the automatic stay by filing a post-foreclosure Rule 3002.1 notice. The court explained that the Rule mandates the creditor to file such notices and failure to do so would jeopardize the creditor's ability to present evidence in a contested matter or adversary proceeding. Likewise, another bankruptcy court refused to find that a stay violation occurred when the creditor provided notice of an increased mortgage payment. *See In re Landry*, 493 B.R. 541 (Bankr. E.D. Cal. 2013) (Sargis, J.). This court noted that "creditors and debtors are allowed to communicate their disparate positions and rights they seek to assert." A stay violation occurs "only when coercion or harassment is coupled with the communication[.]" The court deemed the debtor's argument "unsustainable" as compliance with the law cannot simultaneously violate the law.

QUERY: When are sanctions warranted?

Rule 3002.1(i) provides for sanctions when the holder of a claim fails to provide notice in accordance with Rule 3002.1. Under this provision, the court may preclude the creditor from presenting omitted information or may award other appropriate relief. A creditor's only defenses are substantial justification for the violation or that the failure was harmless.

- Sanctions were not permitted where the debtor made procedural and substantive arguments against the fees, but did not allege a failure to provide information required by Rule 3002.1. *In re Lopez*, No. 10-30844-H3-13, 2012 WL 6760175 (Bankr. S.D. Tex. Dec. 31, 2012) (Paul, J.).
- A Pennsylvania bankruptcy court addressed the issue of whether the holder of a claim could be sanctioned for filing a late supplement to the claim. The creditor failed to appear in court to prove the validity of the notice, and the debtor sought attorney fees incurred due to the claimant's tardy response. The court denied sanctions since the creditor did respond, albeit late, and the late response in no way prejudiced the debtor. *In re Kreidler*, 494 B.R. 201 (Bankr. M.D. Penn. 2013) (Thomas, J.).
- Failure to respond to the Notice of Final Cure Payment is a sanctionable offense. *Sokoloski v. PNC Mortg.*, No. 2:14-1374WBS CKD, 2014 WL 6473810, at *7 (E.D. Cal. Nov. 18, 2014) (Shubb, J.). Further, a debtor may move to reopen a case to seek sanctions against a claimant seeking to recover amounts that should have been disclosed per the Rule. *Id.* (citing Fed. R. Bankr. P. 3002.1, Advisory Committee Note).

Part Three: Case Law Summary:

What if a creditor fails to sufficiently describe itemized fees, charges, or expenses?

Unlike a proof of claim, Rule 3002.1 notices do not carry a presumption of validity. For this reason, detailed descriptions are critical as Rule 3002.1 notices are "more susceptible to challenge." *In re Susanek*, C/A No. 12-23545-GLT, 2014 WL 4960885, at *2 (Bankr. W.D. Pa. Sept. 30, 2014) (Taddonio, J.). Failure to adequately describe charges may lead to denial of post-petition fees. *See In re Pittman*, C/A No. 14-03404-HB, 2015 WL 1262837 (Bankr. D.S.C. Mar. 16, 2015) (Burris, J.) (motion for fees denied when court was unable to reconcile services and charges due to lack of description); *see also In re Lighty*, 513 B.R. 489, 497 n.5 (Bankr. D.S.C. 2014) (Duncan, J.) ("the Court may find the criteria of Rule 3002.1(e) unsatisfied in future challenges to Rule 3002.1 notices where a fuller description of the services performed is not provided in the notices."). Descriptors such as "Review of Plan," "Proof of Claim" and "Attorney Fees" have been found to be insufficient descriptions of services for Rule 3002.1 purposes. *In re Hale*, C/A No. 14-04337-HB, 2015 WL 1263255 (Bankr. D.S.C. Mar. 16, 2015) (Burris, J.).

May a creditor charge a fee for the preparation of the Notice of Payment Change form?

In re Ortega, No. 10-40698-H3-13, 2013 WL 2099726 (Bankr. S.D. Tex. May 14, 2013) (Paul, J.). The lender included a $50 charge on the Notice of Postpetition Mortgage Fees, Expenses, and Charges for preparing the Notice of Mortgage Payment Change. The debtors argued that the $50 should not be awarded because preparation of the Notice was clerical in nature. The court concluded that the $50 fee was not provided for in the underlying agreement. *See also In re Boyd*, No. 12-80400-G3-13, 2013 WL 1844076 (Bankr. S.D. Tex. May 1, 2013) (Paul, J.) (same); *In re Adams*, No. 12-00553-8-RDD, 2012 WL 1570054 (Bankr. E.D.N.C. May 3, 2012) (Doub, J.) (same); *In re Carr*, 468 B.R. 806 (Bankr. E.D. Va. 2012) (Mayer, J.) (same); *In re Sheppard*, No. 10-33959-KPH, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012) (Huennekens, J.) (filing the Rule 3002.1 notice "should be an administrative function that the creditor can accomplish entirely on its own without the need of an attorney.")

- *In re Wirth*, 503 B.R. 800 (Bankr. W.D. Wis. 2013) (Martin, J.). The creditor sought attorney fees arising out of the debtor's objection to its fees. The court denied an award of fees explaining that the fees resulted from a prior insufficient itemization of fees.
- *In re Wallet*, No. 11-10801, 2012 WL 4062657 (Bankr. D. Vt. Sept. 14, 2012) (Brown, J.) (creditor not allowed to recover fees as the collateral securing the mortgage was not the debtors' principal residence and the underlying agreement did not provide for recovery of fees for preparing a proof of claim or Rule 3002.1 notice).

Creditor seeks to recover fees where a Rule 3002.1 notice was not filed within the 180-day period

In re Martins, No. 11-14128-BKC-LMI, 2013 WL 9868648 (Bankr. S.D. Fla. Nov. 20, 2013) (Isicoff, J.). After numerous case dismissals and reinstatements by the debtor to avoid foreclosure, the creditor sought an award of attorney fees incurred from the rescheduling and cancellation of foreclosure sales. The debtor argued that the creditor could not seek fees incurred more than 180 days before the request was filed since Rule 3002.1 requires such notice. The

creditor contended that its request was outside the scope of Rule 3002.1(c) because payment of the fees should be a condition of reinstatement of the case. The court disagreed with the creditor and held that the fees were "recoverable against the debtor or against the debtor's principal residence" and therefore within the scope of the Rule. The court noted that if the creditor could have argued other grounds for the fees, such as sanctions, then Rule 3002.1 would not have applied.

- *See also In re Tuneberg*, No. 11-80629-G3-13, 2012 WL 3744719 (Bankr. S.D. Tex. Aug. 28, 2012) (Paul, J.) (debtor's objection to creditor's notice denied without prejudice where debtor failed to serve creditor's counsel); *In re Owens*, No. 12-40716, 2014 WL 184781 (Bankr. W.D. N.C. Jan. 15, 2014) (Whitley, J.) (creditor was required to comply with Rule 3002.1 since it asserted that the fees were recoverable against the debtors when it mailed the assessment notices).

Do principles of waiver and res judicata apply when a debtor fails to file a Rule 3002.1(h) motion?

In re Bodrick, 498 B.R. 793 (Bankr. N.D. Ohio 2013) (Woods, J.). The debtor failed to respond to the creditor's Cure Response within the 21-day period provided by Rule 3002.1(h), thus the creditor argued that the debtor waived the right to contest the amount due submitted by the creditor. The creditor also argued that *res judicata* applied. The court disagreed and held that Rule 3002.1(h) does not require a response, but "merely provides for what is to happen if a motion is filed." The court held that the debtor had not waived her right to challenge the amount because the debtor would have been unaware of any alleged preclusive effect of the Cure Response, and the Rule 3002.1 notice does not carry a presumption of validity. The res judicata argument was found to lack legal foundation since the amount alleged in the Cure Response was never determined under Rule 3002.1.

- *In re Baca*, No. 13-10-10765 JA, 2012 WL 6647733 (Bankr. D.N.M. Dec. 20, 2012) (Jacobvitz, J.) (creditor estopped from asserting post-petition mortgage arrears in excess of those indicated in its Response).

Creditor must respond by using the Official Form or a "substantially similar" form

In re Nieves, 499 B.R. 222 (Bankr. D.P.R. 2013) (Godoy, J.). Loan servicer objected to the Chapter 13 trustee's notice of final cure. The debtors objected to the servicer's Rule 3002.1(g) statement, arguing the statement lacked accrual dates of charges and was not signed under penalty of perjury. The court concluded that notices under Rule 3002.1(g) required the same detail of itemization as Rule 3002.1(c) notices. In addition, the court held that "the Rule 3002.1(g) response must be signed by the holder under penalty of perjury." The court reasoned that it was nonsensical that one form is signed under penalty and the under is not. Thus, the servicer's statement was found not "substantially similar" to the required form.

Rule 3002.1 continues to apply after stay relief is granted

In re Holman, No. 12-50023, 2013 WL 1100705 (Bankr. E.D. Ky. 2013) (Wise, J.). The creditor was granted relief from the automatic stay and sought relief from the Rule 3002.1 obligations. The Chapter 13 trustee and the creditor contended Rule 3002.1 was either not applicable or could

be waived upon the granting of stay relief since the debt was no longer "provided for" under the plan. Whereas, the United States Trustee argued that the court was not authorized to waive the Rule's requirements. The court agreed with the UST and explained that while the debt was no longer *being paid* under the plan it was still *provided for* in the plan. The court reasoned that trustees and debtors would still require disclosures after granting stay relief because "[s]tay relief does not prevent a debtor from attempting to keep his home." Further, the court noted: "[a] conclusion that Rule 3002.1 is no longer effective after stay relief seems to require a determination that the plan as confirmed is not the same plan after relief from the stay."

- *But see In re Thongta*, 480 B.R. 317 (Bankr. E.D. Wis. 2012) (Kelley, J.) (creditor granted stay relief and subsequently withdrew its claim, therefore Rule 3002.1 is inapplicable since there was no claim and no "cure and maintain" plan).

May the bankruptcy court extend the Rule 3002.1(g) response time?

In re Gutierrez, No. 13-07-10502 JA, 2012 WL 5355964 (Bankr. D.N.M. 2012) (Jacobvitz, J.). The debtor consented to the creditor's motion to extend time to respond. While the Chapter 13 trustee agreed that the failure resulted from excusable neglect, the trustee argued that Rule 3002.1(i) does not apply the "excusable neglect" standard, rather the creditor must be "substantially justified" in its failure to comply. The court ruled that Rule 3002.1(g) was not excepted from the extension provisions of Fed. R. Bankr. P. 9006; therefore, the court could grant an extension as long as the requirements of Fed. R. Bankr. P. 9006(b)(1) were met.

Waiving compliance with Rule 3002.1

In re Adkins, 477 B.R. 71 (Bankr. N.D. Ohio 2012) (Woods, J.). Creditor argued that compliance with Rule 3002.1 was "virtually impossible" and sought relief from the Rule's requirements. While sympathizing with the creditor, the court explained that no provision in the Code authorized the court to waive the requirements.

Split of Authority

Does Rule 3002.1 apply when payments are made to the creditor by the debtor rather than by the trustee, or when no arrearage exists?

Yes.

In re Heinzle, 511 B.R. 69 (Bankr. W.D. Tex. 2014) (Gargotta, J.). The debtors paid post-petition mortgage payments directly to the lender, as provided for in the Plan. The trustee filed a Notice of Final Cure indicating all arrears had been paid. The lender responded and agreed that the arrears were paid, but disagreed that the debtors were current since they failed to pay approximately thirty post-petition mortgage payments. The debtors argued that mortgage payments made directly to the lender were not governed by § 1328(a), so the grant of discharge should be passed on those payments made directly to the trustee. The debtors further argued that the trustee would be estopped from asserting in the Rule 3002.1 notice that the debtors were not current on plan payments, in spite of the missed mortgage payments. The trustee argued that the Rule 3002.1 notice only certified cure of arrearages, not ongoing mortgage payments. The court held that direct payments to the lender were still "under the plan."

- *See also In re Roife*, No. 10-34070, 2013 WL 6185025 (Bankr. S.D. Tex. Nov. 26, 2013) (Isgur, J.) (same).
- *In re Hale*, C/A No. 14-04337-HB, 2015 WL 1263255 (Bankr. D.S.C. Mar. 16, 2015) (Burris, J.) (collecting cases on both viewpoints).

No.

In re Merino, No. 9:09-bk-22282-FMD, 2012 WL 2891112 (Bankr. M.D. Fla. July 16, 2012) (Delano, J.). The court noted that while "Rule 3002.1 does not specifically state that it applies only to payments being made 'inside the plan,'" since the Rule supplements § 1322(b)(5), "[a]n inference may be drawn that Rule 3002.1 does not apply to claims being paid outside the plan."

- *See also In re Garduno*, No. 11-45243-EPK, 2012 WL 2402789 (Bankr. S.D. Fla. June 26, 2012) (Kimball, J.) (Rule 3002.1 does not apply since collateral is not the debtor's principal residence).

ADDENDUM III[15]

Stale Proofs of Claim

Post-*Crawford* Case Law

Gatewood v. CP Medical, LLC (In re Gatewood), 533 B.R. 905 (B.A.P. 8th Cir. 2015)

In *Gatewood*, the Eight Circuit BAP affirmed a Western District of Arkansas bankruptcy court's order granting summary judgment to a defendant in an adversary proceeding concerning a proof of claim supported by a stale debt filed by the defendant. The issue before the court was whether filing a proof of claim supported by a time-barred debt constitutes a violation of the Fair Debt Collection Practices Act ("FDCPA") as a means of debt collection that is either "false, misleading, deceptive, unfair, or unconscionable."

The court first held that filing a proof of claim constitutes a means of debt collection. Relying on Eight Circuit precedent[16] defendant argued that simply filing a proof of claim does not constitute an action to collect a debt because it is not actual "litigation" or the "threat of litigation." The court disagreed, reasoning that while the filing of a proof of claim is an "act done solely to protect the creditor's rights after receiving notice to do so," the filing "invokes the litigation machinery."[17]

While the court held that filing a proof of claim amounts to a means of debt collection under the FDCPA, the court held that filing a proof of claim on a stale debt is not automatically false, misleading, deceptive, unfair, or unconscionable under the FDCPA. The court explained that the "FDCPA does not prohibit *all* debt collection practices . . . it simply prohibits false, misleading, deceptive, unfair, or unconscionable debt collection practices."[18] Thus, simply filing an accurate proof of claim that contains all of the required information, standing alone, is not a violation of the FDCPA.

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[15] Prepared by Zachary R.G. Fairlie, Law Clerk to the Honorable Cynthia A. Norton.

[16] *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001) (holding that "in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid").

[17] *See Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1091 (8th Cir. 2007) ("When a creditor files a proof of claim before the bankruptcy court, this amounts to a civil action to collect the debt, which arguably invokes the litigation machinery.")

[18] Some courts have held that the Bankruptcy Code displaces the FDCPA, meaning the filing of a proof of claim may never form the basis of an FDCPA violation. *See e.g., Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *Townsend v. Quantum3 Group, LLC*, 535 B.R. 415 (M.D. Fla. 2015).

Dunaway v. LVNV Funding, LLC (In re Dunaway), 531 B.R. 267 (Bankr. W.D. Mo. 2015) (Dow, J.)

In *Dunaway*, the court considered whether filing a proof of claim on a time-barred debt violates the FDCPA. The debtors urged the court to adopt the 11th Circuit's holding in *Crawford v. LVNV Funding*, *LLC*, 758 F.3d 1254 (11th Cir. 2014), which held that a creditor violates the FDCPA when it files a time-barred proof of claim. The defendant argued that the "FDCPA protections are inapplicable in the bankruptcy context because the Code has its own set of procedures and protections." The defendant also argued that filing a proof of claim does not amount to an attempt to collect a debt from a consumer, which is required by the FDCPA. Finally, the defendant argued that "even if filing a proof of claim is a debt collection activity, it is not an abusive or deceptive practice as required by the FDCPA."

While the court agreed that filing a proof of claim is an action to collect a debt, the court held that simply filing a time-barred proof of claim does not violate the FDCPA. The court reasoned that a "proof of claim that accurately reflects information on the debt, including the date of last payment, date the account was charged off by the original creditor and the last transaction date" is not an inherently false, deceptive, or misleading representation within the meaning of the FDCPA. The court explained that there can be no violation of the FDCPA "if the claimant complies with all of the rules for filing a proof of claim, including the requirement to supply various attachments with certain specific information, and unless any of that information is false, the filing can hardly be deceptive."[19]

Feggings v. LVNV Funding, LLC (In re Feggins), 540 B.R. 895 (Bankr. M.D. Ala. 2015) (Sawyer, J.)

In *Feggins*, the court consolidated five related cases against two defendants who had filed at least one proof of claim on a time-barred debt in each case. Following the *Crawford* case, the court held that filing a proof of claim on a facially time-barred debt is a deceptive, unfair, and unconscionable attempt to collect a debt in violation of the FDCPA. The court awarded statutory damages under the FDCPA equal to $1000 to each debtor.[20]

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[19] Other cases finding that filing a proof of claim on a time-barred debt does not violate the FDCPA: *Martel v. LVNV Funding, LLC (In re Martel)*, 539 B.R. 192 (Bankr. D. Me. 2015); *Murphy v. Resurgent Capital Services*, *LP*, No. 4:15-cv-506, 2015 WL 5124171 (E.D. Mo. September 1, 2015); *Nelson v. Midland Credit Management, Inc.*, No. 4:15-cv-00816, 2015 WL 5093437 (E.D. Mo. Aug. 28, 2015) (appeal pending); *Broadrick v. LVNV Funding, LLC (In re Broadrick)*, 532 B.R. 60 (Bankr. M.D. Tenn. 2015); *Donaldson v. LVNV Funding*, LLC, 97 F.Supp.3d 1033 (S.D. Ind. 2015); *Torres v. Cavalry SPV I, LLC*, 530 B.R. 268 (E.D. Penn. 2015) (appeal pending); *Jenkins v. Genesis Fin. Solutions (In re Jenkins)*, 456 B.R. 236 (Bankr. E.D. N.C. 2011).

[20] Cases holding that filing a proof of claim on a time-barred debt may violate the FDCPA: *Holloway v. American Infosource (In re Holloway), LP*, 538 B.R. 137 (Barnkr. M.D. Ala. 2015);

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Jenkins v. Credit Management, Inc. (In re Jenkins), 538 B.R. 129 (Bankr. N.D. Ala. 2015) (Robinson, C.B.J.).

In *Jenkins*, the debtor brought an adversary complaint against a claim holder seeking damages for violation of the FDCPA because the holder filed a proof of claim on a time-barred debt. In an amended complaint, the debtor also sought sanctions under Rule 9011. The court dismissed the adversary proceeding because the court found that the debtor had failed to meet the minimum pleading standards and failed to give the safe-harbor notice required under Rule 9011. The court noted, however, that even if the debtor had given the proper safe-harbor notice and met the minimum pleading standards, "the filing of a claim on a debt that is stale under state law—where the proof of claim is otherwise in all material respects compliant—is not egregious and offensive conduct that Rule 9011 was intended to address."

In re Freeman, 540 B.R. 129 (Bankr. E.D. Pa. 2015) (Frank, C.B.J.)

In *Freeman*, the debtor filed a motion seeking disallowance of a proof of claim under § 502(b)(1) and monetary sanctions under Rule 9011(b)(1) and (2) for filing a proof of claim based on a stale debt. While the court noted that the debtor failed to invoke the proper procedure for disallowance under Fed R. Bankr. P. 3007, the court disallowed the claim. The court declined, however, to impose sanctions under Rule 9011. The court reasoned that because there is a split of authority on whether filing a proof of claim on a time-barred debt violates the FDCPA, such a filing is not unwarranted by existing law.

Rule 3002.1: Notice Relating to Claims Secured by Security Interest in Debtor's Principal Residence

QUERY: Must the debtor wait to file a Motion for Determination until after the Trustee has filed a notice of final cure payment? Yes.

In re Thibeault, 2015 WL 5924392 (Bankr. D. Me. October 8, 2015) (Fagone J.)

In *Thibeault*, a month before the chapter 13 trustee filed his Notice of Final Cure Payment, the debtor filed a Motion to Determine Final Cure and Payment ("Motion to Determine"), pursuant to Rule 3002.1(h). The holder of the claim filed a Response to Notice of Final Cure and

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Edwards v. LVNV Funding, LLC (In re Edwards), 539 B.R. 360 (Bankr. N.D. Ill. 2015); *Avalos v. LVNC Funding, LLC (In re Avalos)*, 531 B.R. 748 (Bankr. N.D. Ill. 2015); *Patrick v. Worldwide Asset Purchasing II, LLC*, No. 14-cv-00544, 2015 WL 627376 (S.D. Ind. February 13, 2015) (unpublished).

Payment, pursuant to Rule 3002.1(g). The court denied the Motion to Determine, explaining that Rule 3002.1 requires that "a motion seeking declaratory relief under Rule 3002.1(h) is supposed to await the service of the Rule 3002.1(f) notice *and* the service of a response by the holder of the claim under Rule 3002.1(g)." The court reasoned that it could not grant declaratory relief because it does not have the power to excuse compliance with the specific procedures in Rule 3002.1.

QUERY: Must a debtor initiate a contested matter or an adversary proceeding to object to notice relating to claims secured by a security interest in the debtor's principal residence? It depends.

Rule 3002.1(e) provides that "on motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment . . . is required by an underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code."

Trevino v. HSBC Mortgage Servs., Inc. (In re Trevino), 535 B.R. 110 (Bankr. S.D. Tex. 2015) (Isgur, J.)

In *Trevino*, the debtor filed an adversary proceeding against three defendants for causes of action including violations of the FDCPA, breach of contract, claim objection, violations of the automatic stay, and various other others. The defendants argued that an adversary proceeding was inappropriate because the debtor failed to follow the procedures of Rule 3002.1(e), and an adversary proceeding increased the court costs and delays.

The court held that while the debtors may not have followed the procedures laid out in Rule 3002.1(e), the efficiency argument actually weighed in favor of having an adversary proceeding. The court reasoned that by "consolidating this action into a single adversary proceeding, rather than making a Rule 3002.1(e) objection and then commencing an adversary proceeding," the debtors acted in the interest of judicial economy. The court also reasoned that the differences between contested matters and adversary proceedings are procedural, and to dismiss the case on "procedural grounds alone would be to elevate form over substance."

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In re Longmire, 2015 Bankr. LEXIS 3086 (Bankr. W.D. Tenn. September 11, 2015) (Croom, J.)

In *Longmire*, the debtor filed a Certificate of Plan Completion and Request for Discharge and the trustee then filed a Notice of Final Cure Payment and Completion of Plan Payments. The claim holder did not file a response to the Notice of Final Cure. After the debtor received his discharge, the claim holder threatened the debtor with foreclosure, alleging that the debtor owed over

$3,000 in arrearages. The debtor motioned to reopen the case and then moved for a Determination of Final Cure Payment under Rule 3002.1(h) and sanctions under Rule 3002.1(i).

The court found that by failing to respond to the Notice of Final Cure, the holder failed to adhere to Rule 3002.1(g). Because the holder failed to appear in court or otherwise respond to the debtors motion for determination and sanctions, the court held that the holder would be precluded from presenting any omitted information that should have been filed in a response to the Notice of Final Cure or an amended proof of claim. The court also held that the debtor was entitled to $4,366.20 in expenses and fess caused by the holder's failure to provide the required information.

SUMMARY

OF

MIDLAND FUNDING, LLC v. JOHNSON[16]

Stale Proofs of Claims

Post-*Crawford* Case Law

As of September 20, 2017, *Crawford* has been cited 127 times and *Midland Funding* has been cited 7 times[17].

Midland Funding L.L.C. v. Johnson, ___ U.S. ___, 137 S.Ct. 1407 (2017)

The Supreme Court ruled that a time barred claim is not a "false," "deceptive," "misleading," "unconscionable," or "unfair" collection practice within the meaning of the Fair Debt Collection Practices Act, 15 U. S. C. §§1692e, 1692f ("FDCPA"). The issue before the Supreme Court was essentially the same as the issue presented to the Eighth Circuit Bankruptcy Appellate Panel in *Gatewood*[18] and factually identical to the issue presented to the Eleventh Circuit Court of Appeals in *Crawford*[19]*; i.e.,* whether the filing of a time-barred, but otherwise accurate claim, violates the FDCPA for being false, misleading, deceptive, unfair, or unconscionable.

Midland Funding, LLC ("Midland") filed a proof of claim in Aleida Johnson's Alabama Chapter 13 case. Midland correctly identified on the face of the claim that the charges on Ms. Johnson's account occurred more than 10 years ago. Alabama's statute of limitations[20] to collect on this particular debt is six (6) years. As such, Ms. Johnson objected to the proof of claim as being time-barred. The Bankruptcy Court agreed and disallowed the claim.

Ms. Johnson then sued Midland under the FDCPA asserting that knowingly filing a time-barred or stale claim was "false," "deceptive," "misleading," "unconscionable," and "unfair" within the meaning of the FDCPA. The District Court held the *FDCPA* did not apply and dismissed the suit. The Eleventh Circuit reversed relying on its ruling in *Crawford*. Midland appealed and the Supreme Court granted certiorari.

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[16] Prepared by Rachel Lynn Foley, Foley Law.
[17] *In re Freeman Clay,* Case Nos. 14-41871-drd13, 14-20400-drd13, Adversary Nos. 16-4102, 16-2018 (Bankr. W.D. Mo. Sept. 1, 2017), *In re Odam Case*, No. 17-50035-RLJ-7 (Bankr. N.D. Tex. Sept. 15, 2017) , *In re Agriprocessors*, 859 F.3d 599 (8th Cir. 2017), *Inc, Demarais v. Gurstel Chargo, PA*, No. 16-3173 (8th Cir. Aug. 29, 2017), *McClain v. Head Mercantile Co, Inc,* Civil Action No. 16-780-JWD-RLB (M.D. La. Aug. 28, 2017), *McNorrill v. Asset Acceptance, LLC,* No. CV 114-210 (S.D. Ga. Aug. 1, 2017) and *Willis v. Calvary Investments, LLC.*, No. CV 114-227 (S.D. Ga. Aug. 1, 2017)
[18] *Gatewood v. CP Medical, LLC (*In re Gatewood), 533 B.R. 905 (B.A.P. 8th Cir. 2015)
[19] *Crawford v LVNV Funding, LLC* 758 F.3d 1254 (11th Cir. 2014)
[20] Alabama Code Section 6-2-34

Justice Breyer wrote the opinion for the Court. He first focused on the definition of the word *claim*. Ms. Johnson believed that since Midland's claim was not an "enforceable claim" it would therefore be "false" and "misleading" under the FDCPA. Justice Breyer recognized that while the Alabama statute of limitations provided a defense, the definition of claim does not include the word "enforceable". Accordingly, the proof of claim was not false or misleading as the passage of time did not extinguish the right to the payment.

Justice Breyer then focused on the availability of an audience with legal sophistication to review and dispute claims filed by creditors. Justice Breyer acknowledges that in state court actions debtors are less likely to have counsel available to identify the available defenses and validity of the alleged debt. Further, debtors generally lack the evidence and knowledge of what the alleged debt is about and therefore the *consumer might unwittingly repay a time-barred debt.* Even if the Court were to presume the collection of stale debt in a state court action is "unfair"[21] that was not the issue presented. Therefore the Court had to focus on the issue of time-barred claims in a Chapter 13.

Justice Breyer found that Chapter 13 is where the trustee has a level of legal sophistication to object to such claims. He relies on the claims resolution process being "generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit." *In re Gatewood*, 533 B. R. 905, 909 (2015). One may glean from the Opinion that Justice Breyer believes the Chapter 13 Trustee is an ample gatekeeper of claims. As a result, debtors will not be harmed by the creditors filing time-barred claims, and there is no reason to impose a stricter duty on the creditors.

It is not clear if Justice Breyer considered the cost of time, money, and overall resources it will take for the Chapter 13 Trustee to review, investigate, and object to every claim not appearing to conform to the statute of limitations. However, he did consider the issue of whether filing a proof of claim for a time-barred debt would be a sanctionable under Bankruptcy Rule 9011. After due consideration, Justice Breyer still was not convinced that failure to conduct a pre-filing investigation for a potentially time-barred claim was a 9011 violation. He relied on the opinions issued by several courts finding that the lack of the pre-filing investigation did not provide grounds for sanctions.[22] Finally, in her dissent, Justice Sotomayor noted that *[e]very court to have considered the question has held that a debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA*.[23]

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[21] See, e.g., *Phillips v. Asset Acceptance, LLC*, 736 F. 3d 1076, 1079 (CA7 2013) (holding as much); *Kimber v. Federal Financial Corp.,* 668 F. Supp. 1480, 1487 (MD Ala. 1987) (same); *Huertas v. Galaxy Asset Management*, 641 F. 3d 28, 32-33 (CA3 2011) (indicating as much); *Castro v. Collecto, Inc.*, 634 F. 3d 779, 783 (CA5 2011) (same); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F. 3d 767, 771 (CA8 2001).
[22] *In re Freeman*, 540 B. R. 129, 143-144 (Bkrtcy. Ct. ED Pa. 2015); *In re Jenkins*, 538 B. R. 129, 134-136 (Bkrcty. Ct. ND Ala. 2015); *In re Keeler*, 440 B. R. 354, 366-369 (Bkrtcy. Ct. ED Pa. 2009); see also *In re Andrews*, 394 B. R. 384, 387-388 (Bkrtcy. Ct. EDNC 2008).
[23] *Midland Funding, LLC v. Johnson,* 137 S.Ct. 1407, 1417 (2017)

For some, *Midland,* raises more questions more than it answered regarding the duty of the debt collector to file accurate claims that **are enforceable** under state law. By way of illustration, April Kuehnhoff and Tara Twomey postulate "[t]here is an argument that the Court's holding is limited to where the proof of claim on its face provides evidence that the claim is time-barred, but does not apply where it would not be easy for the trustee to determine from the proof of claim whether or not it was time-barred." Kuehnhoff, A. and Twomey, T. (2017, May 17), FDCPA Implications of May 15 Supreme Court Ruling on Abusive Bankruptcy Proof of Claims.[24]

McNorrill v. Asset Acceptance, LLC, No. CV 114-210 (S.D. Ga. Aug. 1, 2017) and *Willis v. Calvary Investments, LLC.*, No. CV 114-227 (S.D. Ga. Aug. 1, 2017)

Both *McNorrill* and *Willis* are class-actions lawsuits filed in 2014 to determine whether the filing of a proof of claim for a time-barred debt violated the Fair Debt Collection Practices Act. After *Midland Funding*, the court ordered the plaintiffs to explain why the cases should not be dismissed. Although the plaintiffs agreed the cases should be dismissed, they requested the dismissal to be without prejudice. The defendants vehemently opposed and argued to have the cases dismissed with prejudice. On August 1, 2017, the Bankruptcy Court found that "the only prejudice the Defendant will suffer is the slight possibility of another lawsuit" and therefore both cases were dismissed **without** prejudice.

[24] https://library.nclc.org/fdcpa-implications-may-15-supreme-court-ruling-abusive-bankruptcy-proof-claims

B 10 (Official Form 10) (12/12) Chapter 13

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF ALABAMA

PROOF OF CLAIM

Name of Debtor:
ALEIDA HILL

Case Number:
14-00917

NOTE: Do not use this form *to make a claim for an administrative expense arising after the bankruptcy filing.. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (The person or other entity to whom the debtor owes money or property):
MIDLAND FUNDING LLC

COURT USE ONLY

Name and address where notices should be sent:
Midland Credit Management, Inc. as agent for MIDLAND FUNDING LLC
PO Box 2011
Warren, MI 48090
Telephone number: email: MBX_ILMS_Bankruptcy@MCMCG.com
(877) 495-2902
Fax: (866) 818-1718

☐ Check this box to indicate that this claim amends a previously filed claim

Court Claim Number:_____
(If known)
Filed on:____________________

Name and address where payments should be sent (if different from above):

Telephone Number: email

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

1. Amount of claim as of Date Case Filed: $1,879.71

If all or part of your claim is secured, complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: Revolving Credit/Services Rendered
(See instruction #2.)

3. Last four digits of any number by which creditor identifies debtor:	3a. Debtor may have scheduled account as	3b. Uniform Claim Identifier (optional)
XXXXXXXXXXXX-5507	FINGERHUT CREDIT ADVANTAGE (See instruction #3a.)	______________________ (See instruction #3b.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a settoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other (Judgement Lien
Describe:

Value of Property: $__________

Annual Interest Rate:________% ☐ **Fixed** ☐ **Variable**
(when case was filed)

Amount of arrearage and other charges as of time case filed included in secured claim, if any:

$__________________

Basis for perfection: ____________________________

Amount of Secured Claim: $ __________________

Amount unsecured: $ __________________

5.Amount of Claim Entitled to Priority under 11 U.S.C. §.507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (upto $12,475*) earned within 180 days before case was filed or the debtor's business ceased, whichever is earlier1- 11 U.S.C. §507 (a)(4)

☐ Contributions to an employee benefit plan 11 U.S.C.§507 (a)(5)

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7

☐ Taxes or penalties owed to governmental units - 11U.S.C. §507 (a)(8)

☐ Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(_)

Amount entitled to priority

$ __________________

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (see instruction #6)

7. **Documents:** Attach **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured , box 4 has been completed, and redated copies of the documents providing evidence of perfection of a security interest is attached. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. **Signature:** (See instruction #8)

Check the appropriate box.

☐ I am the creditor

☒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

☐ am the trustee , or debtor, or their authorized agent. (See Bankruptcy Rule 3004.)

☐ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005).

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Heather Lynch
Title: Bankruptcy Specialist
Company: Midland Credit Management, Inc.

/s/ Heather Lynch (Signature) 05/29/2014 (Date)

Address and telephone number (if different from notice address above):

Telephone number: email:

Penalty for presenting a fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18U.S.C. §§152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person s who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs form the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002g)

1. Amount of Claim as a Date Case Filed:

State the total amount owed to the creditor on the date of bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24 character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions) If the claim is secured, check the box for the nature and value of the property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate *(and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).

If any portion of the claim falles into any category shown, check the appropriate box(es) and stat the amount entitled to priority. (See Definitions) A claim may be partily piority and partly non-priority. For example, in some categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim services as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach reactded copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open and end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves FRBBP 3001(c) and (d) if the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it.. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirement of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line , you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs form the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name and individual filing the claim and the name of the agent. If the authorized agent is a service, identify the corporate services as the company. Criminal penalties apply for making a false statement on a proof of claim.

ACCOUNT(S) SUMMARY

ACCOUNT INFORMATION:

ACCOUNT HOLDER(S)	CURRENT CREDITOR
ALEIDA HILL	Midland Funding LLC

ORIGINAL CREDITOR NAME	ORIGINAL CREDITOR ACCOUNT NO	ASSIGNOR (if other than original creditor)
FINGERHUT CREDIT ADVANTAGE	XXXXXXXXXXXX-5507	JEFFERSON CAPITAL SYSTEMS LLC

TOTAL CLAIM AMOUNT	UNSECURED PRINCIPAL	INTEREST DUE	FEES	COSTS
$1,879.71	$1,879.71	$0.00	$0.00	$0.00

DATE OF LAST TRANSACTION	CREDITOR AT DATE OF LAST TRANSACTION	CHARGE-OFF DATE	DATE OF LAST PAYMENT
05/28/2003	FINGERHUT CREDIT ADVANTAGE	01/05/2004	05/28/2003

NOTICE AND PAYMENT INFORMATION:

ADDRESS	PHONE/FAX	EMAIL	REFERENCE NUMBER
P.O. BOX 2011 WARREN MI 48090	(877) 495-2902 (866) 818-1718	MBX_ILMS_Bankruptcy@MCMCG.com	14-409326

§ 101. Definitions

In this title the following definitions shall apply:

(1) The term "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized.

(2) The term "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $192,450(*).

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(6) The term "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title.

(7) The term "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case.

(7A) The term "commercial fishing operation" means—

(A) the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products of such species; or

(B) for purposes of section 109 and chapter 12, aquaculture activities consisting of raising for market any species or product described in subparagraph (A).

(7B) The term "commercial fishing vessel" means a vessel used by a family fisherman to carry out a commercial fishing operation.

(8) The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose.

(9) The term "corporation"—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or
(C) entity that has a community claim.
(10A) The term "current monthly income"—
(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—
(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and
(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.
(11) The term "custodian" means—
(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
(B) assignee under a general assignment for the benefit of the debtor's creditors; or
(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.
(12) The term "debt" means liability on a claim.
(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—
(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or
(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.
(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.
(13A) The term "debtor's principal residence"—
(A) means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property; and
(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence by the debtor.
(14) The term "disinterested person" means a person that—
(A) is not a creditor, an equity security holder, or an insider;
(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.
(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
(A) owed to or recoverable by—
(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
(ii) a governmental unit;
(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
(i) a separation agreement, divorce decree, or property settlement agreement;
(ii) an order of a court of record; or
(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.
(15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee.
(16) The term "equity security" means—
(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;
(B) interest of a limited partner in a limited partnership; or
(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph.
(17) The term "equity security holder" means holder of an equity security of the debtor.
(18) The term "family farmer" means—
(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $4,153,150(*) and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such

individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $4,031,575 and not less than 50 percent of its aggregate non-contingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded.

(19) The term "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title.

(19A) The term "family fisherman" means—

(A) an individual or individual and spouse engaged in a commercial fishing operation—

(i) whose aggregate debts do not exceed $1,924,550(*) and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and

(ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) a corporation or partnership—

(i) in which more than 50 percent of the outstanding stock or equity is held by—

(I) 1 family that conducts the commercial fishing operation; or

(II) 1 family and the relatives of the members of such family, and such family or such relatives conduct the commercial fishing operation; and

(ii)

(I) more than 80 percent of the value of its assets consists of assets related to the commercial fishing operation;

(II) its aggregate debts do not exceed $1,868,200(*) and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for 1 dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such corporation or such partnership; and

(III) if such corporation issues stock, such stock is not publicly traded.

(19B) The term "family fisherman with regular annual income" means a family fisherman whose annual income is sufficiently stable and regular to enable such family fisherman to make payments under a plan under chapter 12 of this title.

(20) The term "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

(21) The term "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

(21A) The term "farmout agreement" means a written agreement in which—

(A) the owner of a right to drill, produce, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property.

(21B) The term "Federal depository institutions regulatory agency" means—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation.

(22) The term "financial institution" means—

(A) a Federal reserve bank, or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a 'customer,' as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(22A) The term "financial participant" means—

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than

$1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

(25) The term "forward contract" means—

(A) a contract (other than a commodity contract, as defined in section 761) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a 'repurchase agreement', as defined in this section)(**) consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.

(26) The term "forward contract merchant" means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade.

(27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(27A) The term "health care business"—

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for—

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes—

(i) any—

(I) general or specialized hospital;

(II) ancillary ambulatory, emergency, or surgical treatment facility;

(III) hospice;

(IV) home health agency; and

(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any—

(I) skilled nursing facility;

(II) intermediate care facility;

(III) assisted living facility;

(IV) home for the aged;

(V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

(27B) The term "incidental property" means, with respect to a debtor's principal residence—

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

(28) The term "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor.

(29) The term "indenture trustee" means trustee under an indenture.

(30) The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker.

(31) The term "insider" includes—

(A) if the debtor is an individual—

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;
(iii) general partner of the debtor; or
(iv) corporation of which the debtor is a director, officer, or person in control;
(B) if the debtor is a corporation—
(i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;
(iv) partnership in which the debtor is a general partner;
(v) general partner of the debtor; or
(vi) relative of a general partner, director, officer, or person in control of the debtor;
(C) if the debtor is a partnership—
(i) general partner in the debtor;
(ii) relative of a general partner in, general partner of, or person in control of the debtor;
(iii) partnership in which the debtor is a general partner;
(iv) general partner of the debtor; or
(v) person in control of the debtor;
(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;
(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and
(F) managing agent of the debtor.
(32) The term "insolvent" means—
(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—
(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
(ii) property that may be exempted from property of the estate under section 522 of this title;
(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—
(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and
(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and
(C) with reference to a municipality, financial condition such that the municipality is—
(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or
(ii) unable to pay its debts as they become due.
(33) The term "institution-affiliated party"—
(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act; and
(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act.
(34) The term "insured credit union" has the meaning given it in section 101(7) of the Federal Credit Union Act.
(35) The term "insured depository institution"—
(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and
(B) includes an insured credit union (except in the case of paragraphs (21B) and (33)(A) of this subsection).
(35A) The term "intellectual property" means—
(A) trade secret;
(B) invention, process, design, or plant protected under title 35;
(C) patent application;
(D) plant variety;
(E) work of authorship protected under title 17; or
(F) mask work protected under chapter 9 of title 17; to the extent protected by applicable nonbankruptcy law.
(36) The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.
(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.
(38) The term "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments.
(38A) The term "master netting agreement"—
(A) means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing; and
(B) if the agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any one or more of paragraphs (1) through (5) of section 561(a).
(38B) The term "master netting agreement participant" means an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor.
(39) The term "mask work" has the meaning given it in section 901(a)(2) of title 17.
(39A) The term "median family income" means for any year—
(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and
(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.
(40) The term "municipality" means political subdivision or public agency or instrumentality of a State.

(40A) The term "patient" means any individual who obtains or receives services from a health care business.
(40B) The term "patient records" means any record relating to a patient, including a written document or a record recorded in a magnetic, optical, or other form of electronic medium.
(41) The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—
(A) acquires an asset from a person—
(i) as a result of the operation of a loan guarantee agreement; or
(ii) as receiver or liquidating agent of a person;
(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or
(C) is the legal or beneficial owner of an asset of—
(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or
(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986; shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.
(41A) The term "personally identifiable information" means—
(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—
(i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;
(ii) the geographical address of a physical place of residence of such individual;
(iii) an electronic address (including an e-mail address) of such individual;
(iv) a telephone number dedicated to contacting such individual at such physical place of residence;
(v) a social security account number issued to such individual; or
(vi) the account number of a credit card issued to such individual; or
(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)—
(i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or
(ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.
(42) The term "petition" means petition filed under section 301, 302, 303, or 1504 of this title, as the case may be, commencing a case under this title.
(42A) The term "production payment" means a term overriding royalty satisfiable in cash or in kind—
(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and
(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs.
(43) The term "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee.
(44) The term "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier.
(45) The term "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.
(46) The term "repo participant" means an entity that, at any time before the filing of the petition, has an outstanding repurchase agreement with the debtor.
(47) The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)—
(A) means—
(i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;
(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);
(iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);
(iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), or (iii); or
(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), including any guarantee or reimbursement obligation by or to a repo participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and
(B) does not include a repurchase obligation under a participation in a commercial mortgage loan.
(48) The term "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A.
(48A) The term "securities self regulatory organization" means either a securities association registered with the Securities and Exchange Commission under section 15A of the Securities Exchange Act of 1934 or a national securities exchange registered with the Securities and